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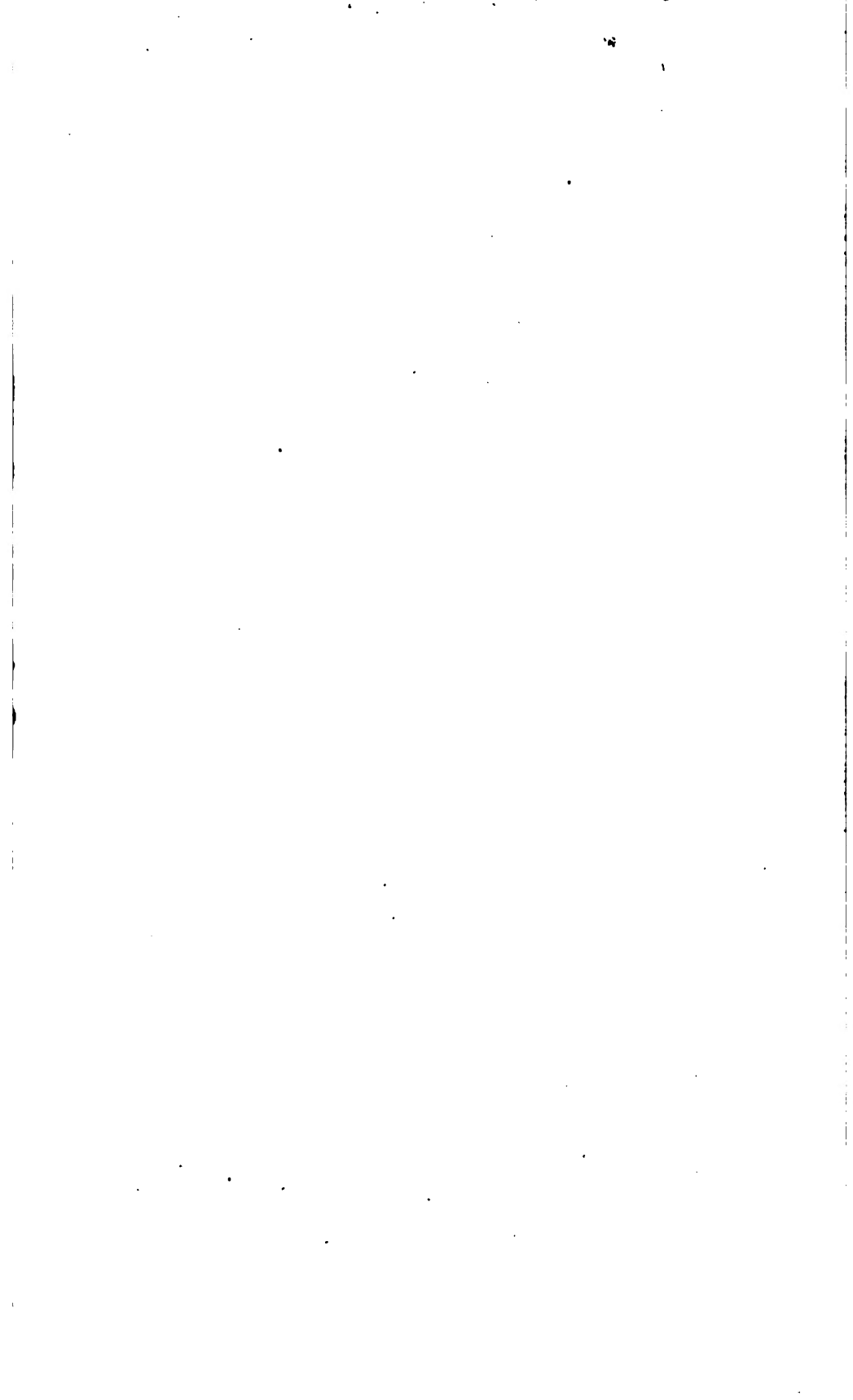
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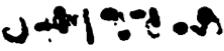
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M. R. Westropp.





NEW
REPORTS
OF
Cases
HEARD IN
THE HOUSE OF LORDS,

APPEALS AND WRITS OF ERROR;
AND DECIDED
DURING THE SESSION
1828.

By RICHARD BLIGH, Esq.
BARRISTER AT LAW.

VOL. II.

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REPORTS OF CASES

HEARD IN THE

HOUSE OF LORDS,

UPON APPEALS AND WRITS OF ERROR,

And decided during the Session 1828.

9th GEO. IV.

IRELAND.

(COURT OF CHANCERY.)

Sir GEORGE FITZ-GERALD HILL, } *Appellant.*
Baronet - - - - - }

BENJAMIN BALL - - - - - *Respondent.*

Upon a bill by the assignee of a judgment against the conusor, stating an award in which a certain sum was found due upon the judgment, and praying that accounts might be taken against the conusor upon the foot of the award, and the judgment, the Defendant, the conusor, cannot by his answer impeach the award, and raise questions which had been discussed before and decided by the arbitrators, as to the state of accounts between the Defendant as conusee, and the conusor of the judgment.

IN 1793, John Claudius Beresford and James Woodmason were bankers and co-partners in Dublin. The Appellant, who had married the sister of J. C. Beresford, kept an account there. Various money transactions had for many years passed between the Appel-

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lant and J. C. Beresford, without any settlement having been made. In a letter dated the 22d of December, 1808, J. C. Beresford called upon the Appellant to settle all the accounts between them, and to pass his bond for the balance; and the Appellant shortly afterwards executed his bond to J. C. Beresford, in the penal sum of 31,000*l.*, to secure 15,500*l.*, being the balance of the account then stated as due.

In 1807 the partnership with Woodmason was dissolved, and John Claudius Beresford, on the 1st of January, 1808, formed a partnership with the Respondent, Benjamin Ball, Matthew James Plunkett, and Philip Doyne, as bankers. On that occasion an arrangement was made, that the notes and engagements of the old firm should be paid by the new firm, and for that purpose the property of the old firm was assigned to trustees. John Claudius Beresford, having been largely indebted to the old firm, he, in part satisfaction of his debt, delivered over to the Respondent, various securities, and amongst others, the bond of the Appellant. The bond was so given in trust for the Respondent and his partners. Judgment was entered up on this bond in Hilary term, 1810. By an indenture of the 24th of March, 1810, duly registered, John Claudius Beresford assigned the judgment for 31,000*l.*, to the Respondent.

A memorial of this assignment was, pursuant to the Act 9 Geo. II., enrolled on the 24th day of March, 1810; and the Respondent became, under the provisions of that Act, the legal owner of the judgment, and entitled as such, to issue execution and levy the amount of it in his own name.

By deed dated 27th of December, 1810, the partnership between John Claudius Beresford and the Respondent, and Matthew James Plunkett, and

Philip Doyne, was dissolved. John Claudius Beresford afterwards became a bankrupt, and a commission of bankruptcy, dated the 22d of March, 1811, was issued against him.

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In Trinity term, 1811, the Respondent obtained a judgment in the Court of King's Bench in Ireland, against the Appellant, for 16,585*l.* 12*s.* 6*d.* debt, besides costs.

The Appellant having questioned the validity of the judgment, and the correctness of the account upon which the bond and judgment were founded, it was agreed between the Appellant and Respondent, that all matters in dispute relating to the judgment, should be submitted to arbitration.

By indenture bearing date the 18th day of February, 1812, made between the Appellant and Respondent, all matters in dispute between them on foot of the judgment for 31,000*l.* and all matters in difference relating thereto, and the credits claimed by the Appellant against the same, were referred to the determination and judgment of the Right Honourable William Cunningham Plunkett and John Radcliffe, who were thereby appointed arbitrators, to hear evidence and determine what sum or sums of money, if any, was actually due or payable by the Appellant on foot of the judgment; and that such award as they should make, should be conclusive, and be made the judgment, order, and decree of the Court of Chancery, &c.

This deed of submission was, by order dated the 3d day of March, 1812, made a rule or order of the Court of Chancery.

The arbitrators having been attended by the counsel and solicitors on both sides, and having heard and read all the evidence brought before them on behalf

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of the Appellant and Respondent respectively, touching the matters in difference, published their award, bearing date the 19th of May, 1812, whereby they awarded that the judgment obtained against the Appellant, and assigned to the Respondent, was a good and effectual security for the principal sum of 15,500*l.* with interest thereon from the 1st of December, 1809, on which day the bond was handed over to the Respondent; and the arbitrators further awarded that there was then due to the Respondent by the Appellant, for interest on the foot of the security, from the 1st of December, 1809, to the 19th of May then instant, the sum of 2,295*l.* 18*s.* 3*d.*, and also a sum of 4*l.* 10*s.* 3*d.* for costs for entering judgment on the bond, and assigning the judgment, making together the sum of 17,810*l.* 8*s.* 6*d.*; which sum the arbitrators awarded to be justly due and owing to the Respondent by the Appellant, for principal, interest, and costs on the foot of the judgment, and further ordered payment thereof to the Respondent, with the costs of arbitration, and that the principal sum of 15,500*l.* should bear interest from the date of the award, until the same should be paid.

This award was by order of the Court of Chancery, dated the 20th day of June, 1812, absolutely confirmed.

After this award was made, the Respondent called upon the Appellant to pay the amount; but the Appellant refusing to pay, the Respondent sued out a writ of *elegit* to the sheriff of the city and county of Londonderry, dated the 23d of June, 57th George III. marked for the sum of 21,641*l.* 3*s.* 1½*d.* whereupon the sheriff duly held an inquisition, whereby it was found, that the Appellant was then possessed of the lands for the several terms of years therein re-

cited, and was also seised in fee of the several other lands and premises therein also recited. In order to get possession of these lands and premises, it became necessary to bring an ejectment on the title grounded on the inquisition, but the Respondent having discovered, that the Appellant had, previously to the entering up the judgment, charged or incumbered all the lands and premises comprised in the inquisition in July, 1817, filed his bill in the Court of Chancery in Ireland.

The bill stated the several conveyances and leases found upon the inquisition and the judgments, and that an elegit had been sued out, and an inquisition taken ; and that by means of the mortgages, the Respondent was prevented from proceeding at law. The bill did not state the award. It was filed against Sir George Fitz-Gerald Hill, John Claudius Beresford, Hall Chambers, who was the assignee of John Claudius Beresford, William Goslin, John Chambers Irwin, Sir Harvey Aston Bruce, John Wilson and William Warren, who claimed two separate judgments against Sir George Fitz-Gerald Hill and John Claudius Beresford, in the penal sum of 2,000*l.* for securing 1,000*l.*, praying, that the Respondent, Benjamin Ball, might be decreed to be entitled to redeem the mortgages, so far as the same affected the estates and properties of Sir George Fitz-Gerald Hill ; and that so much of the mortgage debts as were the proper debts of John Claudius Beresford, might be levied and raised out of the estates of John Claudius Beresford alone, so that the estates of the Appellant might be exonerated therefrom, and for that purpose, that the estates of John Claudius Beresford, or a competent part thereof, might be sold ; the Respondent thereby undertaking to pay to William Goslin and John

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Chambers Irwin, such sums as they should appear entitled to for the redeeming of the Appellant's estates; and that after payment thereof by the Respondent, the Appellant might be ordered to repay the same to the Respondent, and in default thereof, that the Appellant and the Defendants to the bill entitled to redemption of the mortgaged premises, might be for ever barred from all equity of redemption; and that the mortgaged premises, or a competent part thereof, might be sold; and that all such sums of money as the Respondent should be obliged to pay for the redemption of the mortgaged premises, with interest, and all costs to be incurred by him, might be repaid to him; and that all incumbrances prior to the mortgages might be paid out of the produce of such sale; that all necessary parties might be compelled to execute conveyances; that an account might be taken of what was due on the mortgages as the debt of the Appellant, and also what was due thereon from John Claudius Beresford, and of what was then due to the Respondent on the judgment so assigned to him by John Claudius Beresford, and of the judgment obtained by the Respondent against the Appellant; and that all other just and necessary accounts might be taken; and that in the mean time a receiver might be appointed; and for general relief.

The bill was afterwards amended to make other parties Defendants who claimed an interest in the premises.

The Appellant, by his answer to the amended bill, contended that the bond on which the judgment stood for 31,000*l.* was passed by him, not for a sum mutually agreed upon as due from him to Mr. Beresford, but as a cover or guarantee to secure Mr. Be-

resford in such sum as might appear, on an examination of their accounts, to be due; and he stated money transactions which had subsisted between him and Mr. Beresford, with a view of making it appear that no accounts were ever finally settled between them; that there was not so much due by him to Mr. Beresford as the bond was given to secure, inasmuch as he had after the date and execution of the bond made several payments to Beresford, and that he was entitled to as much equity against the Respondent (the assignee of the judgment) as against Mr. Beresford himself.

In consequence of this answer, the bill was again, on the 2d of January, 1819, amended, for the purpose of setting up the award, thereby stating the deed of submission and the rules thereon: and also stating, that all the matters set up by the Appellant in his answer, as impeaching the judgment, were the same which he had set up before the arbitrators.

To this bill the Appellant put in an answer on the 28th day of June, 1819, recapitulating all the evidences and accounts which he had gone into before the arbitrators, and contending, that though he attended before the arbitrators by counsel and solicitor, his defence was not sufficiently explained and understood. It appeared in evidence that the Appellant's defence, then set up, was by claiming certain payments made by the Appellant to John Claudius Beresford, and certain equities which he also claimed against John Claudius Beresford, and this defence was insisted upon by Appellant's counsel before the arbitrators.

The Defendants Beresford and Bruce not having appeared, a decree of sequestration issued against them. The other defendants by their answers admitted the facts.

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The cause was heard on the 3d of August, 1821, on the 16th of August a Decree was made by the Lord Chancellor, according to the prayer of the Bill.

The Appellant, being dissatisfied with this decree, obtained an order for a re-hearing, and the cause was re-heard at great length, when a consent was entered into by the counsel of the Appellant and Respondent, that all the correspondence on both sides should be produced to the Court, and read.

On the 22d of November, 1821, the decree was affirmed. The appeal was against the original decree, and the order affirming it.

For the Appellant—*Mr. Sugden* and *Mr. Koe*.

For the Respondent—The *Attorney General* and *Mr. Pepys*.

It was contended on behalf of the Appellant that judgment should stand only for what should appear to be due from him to Beresford, on taking the account between them and that the objection to the award being introduced by way of equitable defence to a claim in equity ought to be entertained.

The Respondent's counsel relied upon the award as concluding the question between the parties.

The case was argued in part, in June, 1827, and was further heard on the 14th of February, 1828—when the decree was affirmed without observation and with costs.

Decree affirmed with 100*l.* costs.

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ENGLAND.

(KING'S BENCH.)

JOHN DOE, on the several Demises of)
 RICHARD HENRY TOLSON, THOMAS) *Plaintiff*
 AKENHEAD WARD, and WILLIAM) *in Error.*
 COCKBURN - - - - -

JOHN SANDERSON FISHER - *Defendant in Error.*

The opinion of a judge directing the Plaintiff in an action to be nonsuited, if it does not appear on the record, cannot be questioned in a writ of error. The Plaintiff, if he intends to bring a writ of error on the ground of misdirection, in point of law, should not submit to be nonsuited, but appear, and put the judge to express such opinion, by way of direction to the jury; and thereupon tender a bill of exceptions to the judge, and procure his signature thereto.

THIS was an action, commenced by the Plaintiff in error, against the Defendant in error, by original writ in the King's Bench; the declaration in four counts, stated in various ways, leases by Tolson, Ward, and Cockburn, to John Doe, with entry and ouster, by the Defendant in error.

The Defendant in error pleaded the general issue, upon which issue was joined. Upon the trial, at York, the Defendant in error, who claimed as issue in tail, proposed to give evidence of the intail, and his right under the gift, as issue in tail; but he was unable to produce any evidence of seizin and possession under the intail, within twenty years before the action commenced, whereupon Hulloch, B., the Judge before whom the cause was tried, being of opinion that

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John Doe had failed to prove his title to recover, directed a nonsuit, and judgment of nonsuit was afterwards signed against the Plaintiff in error, and final judgment was afterwards signed for damages, costs, and charges. Whereupon the Plaintiff in error brought a writ of error, returnable in parliament, and assigned the general errors, and particularly the direction of the judge, that the Plaintiff must be nonsuited, and prayed a certiorari for the purpose of verifying his allegation; to which assignment the Defendant in error rejoined generally.

For the Plaintiff in error—The *Attorney General* and *Mr. Sugden*.

For the Defendant in error—The *Solicitor General* and *Mr. Ford*.

The argument on the part of the Plaintiff in error, raised the long disputed question, whether each successive tenant in tail may assert his right within the statutory time of limitation after his title accrues, or whether one period only of limitation is allowed after the time has once begun to run upon an estate under the intail vested in a person not under incapacity.*

The case on the part of the Defendant in error, stood upon the technical ground that the opinion and direction of the Judge, could only appear upon a bill of exceptions which had not been tendered to him at the trial; and that therefore the legality of such supposed opinion, could not be discussed; and upon this ground the judgment was affirmed.

* See an argument and decision upon this question, in Moore's Rep., vol. vi. p. 542, *Tolson v. Kaye*, and in 3 B. & B. 207. S. C.

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TRANT

v.

DWYER.

## IRELAND.

(COURT OF EXCHEQUER.)

JOHN TRANT - - - - - *Appellant.*JOHN DWYER - - - - - *Respondent.*

A lease of lands in Ireland contained a covenant on the part of the lessor for perpetual renewal; and a covenant on the part of the lessee, to pay 1*l.* sterling, for every perch of bog, cut otherwise than thereby covenanted, and to be distrained for as additional rent. Upon a bill filed by the assignee of the lease and his mortgagee against the assignee of the lessor, for a specific performance of the covenant for renewal, it appeared that three years before the filing of the bill, a notice had been given by the landlord to the tenant to name new lives in the place of those which had expired, and to pay the fines with interest, &c.; but in the interval, a correspondence had taken place, from which it was to be collected, that the tenant had always been ready to pay the fine; but that the landlord alleging, by his answer in the suit supported by evidence, that the tenant had cut large quantities of turf in breach of his covenant, and had also made encroachments upon other lands, refused to renew until those two questions were settled; and although no actual tender of the fines had been made, it was clear from the correspondence that they would have been refused, if made.

Held affirming the decree of the Court below, that under these circumstances, the delay of three years was not under the Irish tenantry act such gross *laches* as ought to deprive the tenant of the right of renewal, and work a forfeiture of the lease; but that the landlord ought to be compelled specifically to perform the covenant for renewal. Held also, that in making this decree for the performance of part of the contract between the parties, it is not necessary for a Court of Equity to provide for the performance of the other part; namely, the covenant against cutting turf, otherwise than by leaving the landlord at liberty, by the decree upon further directions to bring an action at law upon that covenant, especially as that liberty

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had been given by the original decree ; and an action brought against the tenant which abated by his death, and thereupon no application had been made by the landlord to the Court of Equity for its assistance.

**STEPHEN** Rice, being, in the year 1748, seized in fee of the lands of Lower Dovea, Killaghara, Ballybrist, and Ballynahow, in the County of Tipperary, including a turf bog, which lay contiguous to the several lands, by lease bearing date the 7th of January, 1748, demised the lands of Ballynahow, with its appurtenances, unto Samuel Hughes, for three lives therein named, at the yearly rent of 150*l*.

The lease contained a covenant on the part of the lessee, “ that he, his heirs, or assigns, should not  
 “ commit, or wilfully suffer to be committed, any waste  
 “ on the premises, and should cut his or their turf in  
 “ straight drains, to be cut sloping one foot narrower  
 “ for every foot in depth, and agreeable to the natural  
 “ fall of the land, and of such an equal depth as to  
 “ preserve a hanging level at the bottom, and to begin  
 “ at the lowest part of the ground where such drain  
 “ or drains should from time to time be cut, and that  
 “ he or they should leave at convenient distances on  
 “ such drains, parts uncut, of ten feet in breadth each  
 “ part for bridges, and bore holes underneath on a  
 “ level with the bottom of such drains, to let the water  
 “ pass ; and that he or they should pay 1*l*. sterling for  
 “ every perch of bog, which should be cut on the pre-  
 “ mises during said demise, other than as is thereby  
 “ covenanted, and that yearly, to be recovered and  
 “ distrained for as an additional rent.”

Stephen Rice, by indenture of lease and release bearing date the 21st of February, 1748, and duly registered, in consideration of 50*l*., assigned the lands

of Lower Dovea, Killaghara, and Ballybristy, and also the lands of Ballynahow, to Dominick Trant, and his heirs for ever, reserving thereout a yearly rent of 471*l.* 5*s.*: but Dominick Trant subsequently reconveyed to Stephen Rice the fee of the several lands, and took a lease thereof for lives renewable for ever, subject to the same rent of 471*l.* 5*s.*

Stephen Rice having by articles, agreed to renew the lease of the lands of Ballynahow; Dominick Trant afterwards, by deed dated the 3d of December, 1756, agreed with Samuel Hughes to renew the lease accordingly for ever, on payment of a renewal fine of 10*l.*, on the fall of each life.

The Appellant on the death of his father, in the year 1790, having become seized of Dominick Trant's interest in the lands, and Peter Latouche, being seized of Stephen Rice's estate and interest therein, the Appellant, soon after he attained his age, purchased the head rent, and reversion in fee of the three other denominations from Peter Latouche, in June, 1805, and afterwards, in December, 1808, purchased the reversion and head rent of the lands of Ballynahow, and took assignments thereof respectively from Peter Latouche, dated respectively the 15th of June, 1805, and 5th of December, 1806, and thereupon became seized absolutely in fee thereof, subject to the lease to Hughes.

The lessee's interest in the lease of 1748, after the death of Samuel Hughes, in 1785, became vested in Charles O'Neill, who paid to Dominick Trant, the Appellant's father, a sum of money in discharge of renewal fines due upon the fall of the lives of Samuel Hughes, and Edward Dawson, two of the *cestui que vies* named in the original lease of 1748, and thereupon nominated Francis Annesley Hughes

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and Mary Hughes as two lives to be substituted in the room of the deceased *cestui que vies* under the agreement for renewing the lease.

Charles O'Neill afterwards assigned his interest, in the lands to Cooper Crawford, who, by deed of the 30th of October, 1792, reconveyed the same to O'Neill, in mortgage to secure a sum of 2,000*l.* with interest.

The mortgage to Charles O'Neill having subsequently been assigned to the Respondent, John Dwyer, the Respondent obtained a further mortgage of the equity of redemption in the lands, from Cooper Crawford, in the year 1804, to secure a further sum of 1,000*l.* with interest to the Respondent.

In the year 1808 a dispute arose between the Appellant and the Respondent, respecting the bogs contiguous to the lands occupied under the lease—the Appellant contending that no part of the bog was demised by the lease; that even if a proportional part was demised, the lessee had encroached upon the bog and occupied more than his due proportion; and that he had broken the covenant in the lease, by cutting turf for public sale, and otherwise contrary to the provisions of the covenant, by which large penalties had been incurred. The Respondent contended that he was intitled under the terms of the lease, to the proportion of the bog, occupied by him, and that no breach of the covenant by cutting turf had been committed.

On the 24th of December, 1810, the Appellant served on Cooper Crawford, a notice which, reciting the lease of 1748, and his own and Crawford's title, and that all the lives had expired, and the encroachment upon the bog, and the alleged breach of the covenant by cutting turf, proceeds thus:—  
 “ Now take notice, That I require you forthwith to

“ pay me up all rent due out of the said lands, together with the sum of 372*l.* 12*s.* due for renewal fines, septennial fines, and interest due upon the deaths of the said Samuel Hughes, Mary Hughes, and Edward Dawson. And I also require you to restore me to the possession of such parts of the said bog of Lower Dovea, as you have so possessed yourself of, and likewise to pay to me the sum of 1*l.* sterling, for every perch of turf cut on the said bog, contrary to the covenant in said lease of 7th of January, 1748. And take notice, That unless you forthwith comply with this reasonable request, (which I have heretofore repeatedly called upon you to do without effect,) I will not hereafter consider myself bound to renew your lease of the said premises, and will take such proceeding, as I shall be advised to recover the possession thereof, discharged of any lease or claim you may have for a renewal.”

The fines, as stated in the notice, were calculated as upon the three lives named in the lease of 1748, as if no fines had ever been paid since the execution, as the Appellant then conceived to be the fact; but it appeared at the hearing of the cause, that two renewal fines had been paid to Dominick Trant, in the year 1787, and that thereupon he gave a receipt for the same, nominating Mary Hughes a minor, and Francis Annesley Hughes, as *cestui que vies* in the lease of the premises, in place of Edward Dawson and Samuel Hughes deceased; but no deed of renewal was executed.

At the time of the service of the notice there was one fine of 10*l.* and interest thereon from the death of Mary Hughes the elder, the survivor of the original *cestui que vies* in the lease of 1748, who died in the year 1808,

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due to the Appellant; and it was suggested by the Appellant that Francis Annesley Hughes, one of the substituted lives nominated in the receipt, was also dead at the time, in which event a second fine had become due to Appellant. Mary Hughes the younger, the other life nominated in the receipt, and survivor of all the original *cestui que vies*, died in February, 1812, and from thenceforth there remained no life in being, if Francis Annesley Hughes had previously died.

After service of the notice, several meetings between the parties and a long correspondence ensued on the subject of the encroachments on the bog, and the breach of the covenant in cutting turf. But the parties being unable to effect any amicable adjustment of their mutual claims, the Appellant, by letter dated in October, 1812, altogether declined to renew the lease.

On the 1st of March, 1814, Cooper Crawford, together with the Respondent, John Dwyer, as mortgagee of Crawford's interest in the lands, filed a bill against the Appellant, in the Court of Exchequer, in Ireland, for a renewal of the lease of 1748, having, on the 25th of February, 1814, caused a sum of 50*l.*, to be tendered to Appellant in discharge of the fines for renewal and interest due thereon.

The bill insisted that the parts of the bog improved and taken in by the tenants of the lands belonged to the demised premises of Ballynahow, and that neither O'Meara, nor any undertenant of Plaintiff's was in possession, save rightfully under the lease, of any part of the Appellant's estate. The Appellant by his answer, insisted upon the grounds stated in the notice, and also because the Respondent had neglected within a reasonable time after notice, to pay or tender the fines, that he was not bound by law to grant the renewal.

The cause was heard on the 2nd of June, 1815, when it was ordered, “ that the cause should stand, “ with liberty for the Appellant to bring an ejectment “ for such part of the premises as he should be advised ; “ and on the trial of such ejectment the statute of “ limitations not to be set up, and that the Defendant “ should be also at liberty to bring any action of “ covenant he might think fit, and upon any action “ of covenant to be brought against Plaintiff Cooper “ Crawford, that service of process upon his attorney “ should be deemed good service, and that Cooper “ Crawford should plead issuably, and go to trial in “ both causes, or which ever of them Defendant might “ proceed on, at the then next Assizes at, &c.; and that “ Cooper Crawford should admit that the term in the “ lease of the 7th of January, 1748, in the pleadings “ mentioned, was still in being and vested in him, “ and the lessor’s interest vested in the Defendant, “ and that ejectment or action, or both, should be “ brought forthwith and be tried by a special jury, “ and that the Plaintiff should wave all temporary “ bars, and that the question to be tried on the eject- “ ment should be whether the Plaintiff Cooper Craw- “ ford, or his undertenants, were in possession of any, “ and what quantity of land or bog not demised to “ Samuel Hughes, deceased, by Stephen Rice, de- “ ceased, by the lease of the 7th of January, 1748, in “ the pleadings mentioned.”

The Appellant thereupon brought an ejectment on the title in pursuance of the order, to which a defence was made in the name of Cooper Crawford. The Appellant also commenced an action of covenant to recover damages for the breaches in the lease against Crawford, and issue being joined, and both causes ready for trial, Crawford died, and the Respondent

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having refused to become a defendant in his place, the causes abated.

The Appellant thereupon served an ejectment in Hilary term, 1816, upon John O'Meara, the occupying tenant of the lands, who consented to be bound by the decretal order of the 2nd of June, 1815: but the action of covenant was abandoned, as the Respondent would not allow his name to be made use of.

Upon the trial of the ejectment, the jury found "that Crawford, or his undertenants, were in possession of 234*a.* 2*r.* 3*p.* more than were demised "by the lease of 1748 of land and bog."

On the 29th of May, 1817, the Appellant took possession under an *habere* of the 234*a.* 2*r.* 3*p.*

The suit in the Exchequer having abated by the death of Cooper Crawford, the Respondent in February, 1818, filed a bill of revivor against the Appellant, and made William Cooper Crawford, a minor, as heir at law of Cooper Crawford, a defendant; the representatives of Cooper Crawford, deceased, having declined interference therein, Cooper Crawford having died in embarrassed circumstances, and his property being insufficient to pay the amount of his debts.

John O'Meara was committed to prison, and afterwards discharged as an insolvent, and died.

The cause in the Exchequer was finally heard in 1820; when the Court pronounced the following decree:—

"Upon reading the Judge's report and certificate  
 "of the verdict, and it appearing to the Court, that  
 "the Defendant, John Trant, has since executed  
 "an *habere* and taken possession of the lands so  
 "recovered; decree the Plaintiff entitled to a re-  
 "newal of the lease of the 7th of January, 1748, ac-  
 "cording to the covenant contained in the deed of

“ the 3rd of December, 1755, upon payment of  
 “ all sums due for rent and renewal fines, to be cal-  
 “ culated according to the usual course of the Court,  
 “ and of all costs at law, and the costs of this cause:  
 “ and in case the parties differ about the description  
 “ of the premises, or otherwise respecting the terms of  
 “ the said renewal, refer it to a Baron, to settle and  
 “ approve of the draft thereof having regard to the  
 “ said verdict, so as not to include in the said renewal,  
 “ a demise of any part of the land or bog so recovered  
 “ from John O’Meara, under and by virtue of the said  
 “ ejectment: and let the names of John S. Dwyer  
 “ and Francis D. Dwyer, being those named in bill  
 “ by the Plaintiff for that purpose, be inserted in the  
 “ place of Mary Hughes the elder, and Mary Hughes  
 “ the younger, and refer it to the Chief Remembrancer  
 “ or his deputy, to take an account of the rent due  
 “ and of the renewal fines, and interest thereon, ac-  
 “ cording to the usual course of the Court: and up-  
 “ on payment of such rent, renewal fines, and interest  
 “ thereon, as shall be found by the said officer to be  
 “ due as aforesaid to the Defendant, John Trant, let  
 “ him execute the said lease, and declare such renewal  
 “ to be made to the Plaintiff as mortgagee, liable to the  
 “ equity of redemption reserved upon the mortgages  
 “ of the original lease vested in the Plaintiff, and de-  
 “ cree him entitled to tack to his said mortgages what  
 “ he shall so pay in pursuance of this decree; and let  
 “ this decree be without prejudice to any action  
 “ which the Defendant, John Trant, may be advised  
 “ to bring against the representatives of the said  
 “ Cooper Crawford or John O’Meara, or either of  
 “ them, for breaches of any covenant contained in  
 “ said original lease since the same vested in the said  
 “ Cooper Crawford.”

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Against this decree the appeal was presented.

For the Appellant—*Mr. Brougham* and *Mr. Stephenson*.

The Respondent must be affected by the gross laches of the tenant in omitting to pay the renewal fines and to take out the required renewal: no tender of any fine for renewal, or of any compensation to the landlord for the tortious acts of the tenant, and those claiming under him, having been made by the Respondent or any other person until after more than three years from the service of Appellant's notice. The Respondent was bound at his peril to act upon the service of the notice to renew, made on Cooper Crawford, his mortgagor, particularly as the Appellant, until the filing of Respondent's original bill, was unapprised of the Respondent's title or interest in the lease. Although the Appellant may by his notice of the 20th of December, 1810, have demanded a greater sum for renewal fines and interest thereon, than he was then entitled to demand, yet the lessee seeking the benefit of such renewal was bound thereupon to have set his landlord right as to his mistake, and to have ascertained and tendered to him the sum really due for such fines without further unreasonable delay, which he did not do, nor tender any sum whatsoever for the fines for upwards of three years after the service of the notice.\* A tenant abusing the trust which subsists between him and his landlord, wilfully violating the covenants in his lease, and converting the possession with which he has been entrusted into the means of encroachment on his landlord's adjoining estate, and of defacing the bounds

\* *Jackson v. Saunders*, D. P. 16th July, 1814, MS. and 2 Dow. 453. *Lord Mountnorris v. White*, D. P. 20th Feb. 1816, MS. and 2 Dow. 470. *Barrett v. Bourke*, D. P. 1816, MS. and 5 Dow. 20.

and landmarks of the farm committed to his possession, and after so doing claiming to retain such encroachment for his own benefit against his landlord, and obliging such landlord to bring an ejectment in order to recover possession, forfeits all claim on such landlord for a renewal of his original lease, as well as all title to assistance from a Court of Equity to compel such renewal.

Even if any renewal of the tenant's interest ought to be decreed in this case, such decree ought at least to have imposed upon him the terms of making full satisfaction or compensation to the Appellant for his damages by reason of such breaches of covenant, as also for the mesne profits due to Appellant in respect of such wrongful encroachments on his estate, the ascertainment and payment of which damages and mesne profits ought to have been made preliminary to any such renewal. The Appellant under the circumstances is left without remedy for the recovery of such damages; the legal estate under the lease of 1748 having expired, and the covenants contained therein determined. It was the more incumbent on the Court to impose such terms on the party seeking the renewal in this case, since it appeared that Cooper Crawford and John O'Meara, the undertenant of the lands, have both died insolvent.

The decree, in professing to leave the Appellant at liberty to prosecute any action he might be advised to bring against the representatives of Cooper Crawford and John O'Meara, or either of them, for breaches of any covenant contained in the original lease since the same had vested in Cooper Crawford, altogether omits to provide any means whereby the Appellant might be enabled to maintain any such action, or to recover any fruits from it, such action not being

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at all maintainable without the aid of the Court imposing terms similar to those contained in the decretal order of the Court, of the 2nd of June, 1815, in pronouncing which order it appears to have been the opinion and intention of the Court, that the immediate tenant of the lands should be held responsible for such breaches of covenant committed by his undertenants.

The Respondent in this case, is to be considered as standing in the situation either of immediate tenant of the Appellant, in which case he must be held responsible for the fraudulent misconduct and waste committed by his undertenants, and by reason thereof to have forfeited his claim to any renewal of his lease, or else in that of a mortgage creditor of such tenant, in which character he cannot be entitled to any relief in the premises beyond the preservation of his mortgage security for his own benefit alone, which relief ought not to be extended incidentally, (as has been done by the decree appealed from,) to give the benefit of a renewal to the representatives of the mortgagor, and to fraudulent and defaulting undertenants, who had forfeited their right to renewal: and the rather in this case when the Appellant by his counsel at the hearing below offered, as he now again does, in case the Respondent is entitled thereto, to pay the Respondent the balance due on the foot of his mortgage, on having the bill in this case dismissed.

For the Respondent.—*Mr. Pepys* and *Mr. Tinney*.

No such fraud has been proved against the tenants of the leasehold premises, or their assignees, within the meaning and scope of the Irish tenantry Act, as to deprive them of the benefit of the Act. The Appellant, in case of any such fraud, or in case any for-

feiture of the lease had been committed, and had not been waived, has by his proceedings in ejectment, in which he has recovered only lands found not to be comprised in the original lease, and by not bringing any action of covenant under the liberty given him in that behalf, by the decree of the 2nd of June, 1815, waived such matters, and precluded himself from setting up the same. No demand and refusal of the fines for renewal, so as to deprive the tenant of the benefit of the Act, has been proved, even as against the original complainant, Cooper Crawford, who, on the contrary, was always anxious to pay the same when ascertained. No such demand was ever made against the Respondent, nor was there any such difficulty of finding him as to excuse the want of such demand; nor, if there had been, do the steps prescribed by the Act, in case of such difficulty, appear to have been taken.

*The Lord Chancellor.*—The question in this cause arises under a lease which was made as far back as the year 1748. It was a lease held for three lives, with a covenant for perpetual renewal. The freehold ultimately vested in the present Appellant, Mr. Trant, and a person of the name of Cooper Crawford, became interested in the leasehold estate. Cooper Crawford mortgaged this property, and Mr. Dwyer stood in the situation of mortgagee. Cooper Crawford, or the person under whom Cooper Crawford held under-let the estate to a person of the name of O'Meara, for three lives renewable for ever. In the year 1787 two of the original lives fell in, and those lives were renewed and the fines were paid in that year. In the year 1808 Mary Hughes, who was one of the three lives then existing, died; the lease was not renewed at that time.

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In the year 1810 Mr. Trant, having gone over to Ireland, made some enquiry as to the state of this property, and had reason to believe that encroachments had been made upon his adjoining estate, by the tenant of this property, which had been leased. Mr. Trant at that time was not at all aware of the renewal in the year 1787. On looking at the lease he had reason to believe, from the information he had received, that the covenant had been broken with respect to the manner in which the turf should be cut; and under those circumstances, and with this information, he gave a notice to the tenant of Mr. Cooper Crawford, who was the owner of the leasehold interest, that he should expect forthwith that the three lives should be renewed, and the encroachment on the adjoining estate should be abandoned, and a compensation, according to the terms of the lease, made for the breaches of the covenant; and that unless those terms were complied with, he should not feel himself bound to renew the lease. Upon enquiry, it was found, however, that the two lives I have mentioned had been renewed in the year 1787. This part of the case, therefore, may be left entirely out of consideration. There was at that time, in respect of the life which had fallen in the year 1808, one fine due for the renewal—there was a question with respect to the encroachment on the adjoining estate—and a question also existing as to the turf.

In point of fact, no tender of this fine was made until the year 1814, three years after the notice had been given—and it was contended upon these circumstances, that under the Irish tenantry Act, three years having been suffered to elapse after notice had been given to renew and to pay the fine, that was an unreasonable period, and there was such an omission

on the part of the tenant, that he had forfeited his right to renew—and this was the main question in the cause: it was the main question in the Court below, and the main question on the appeal; and if the questions stood on these facts, I think your Lordships would be clearly of opinion that the tenant having suffered three years to elapse after notice had been given, calling on him to pay the fine on the renewal, that was more than a reasonable period; and he would, under the clause of the Irish tenantry Act, have lost his right to claim the renewal. But in point of fact, almost immediately after the notice was given, a correspondence took place between the tenant, Mr. Cooper Crawford, on the one side, and Mr. Trant, the landlord, on the other, and the agent of Mr. Trant, Mr. Dickson, with respect, not to the fine which does not appear to have been a matter of contest between them after the explanation had been given as to what had taken place in the year 1787, but as to the encroachment—and as to the breach of covenant—and particularly as to the encroachment on the adjoining estate of Mr. Trant. It appears in the whole course of that correspondence, that Mr. Crawford, the tenant, was ready at any moment to have paid the fine, and to have obtained the renewal, but that Mr. Trant was unwilling to grant a renewal unless the question as to the encroachment on the adjoining estate was settled, or unless that part which was in question was altogether abandoned. At last, in the month of October, 1812, Mr. Trant was perfectly satisfied that an encroachment had taken place; and it turned out afterwards, on enquiry before a jury, that very large encroachments had been made by Mr. Crawford, or his undertenants.

Now the question is under these circumstances;

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Mr. Trant having refused to renew, and Mr. Crawford having been constantly ready to renew and pay the fine, whether the tenant has lost his right from the neglect of not paying the fine, and I think clearly that he has not. The tenant was ready at any moment to renew; it is quite clear from the language of the correspondence, that he was ready to renew, and it would have been altogether an idle ceremony for him to have tendered the money. In point of fact, no tender did take place till the year 1814; nor do I conceive, under these circumstances, and from the nature of the correspondence, that a tender was at all necessary. Both the parties understood that Mr. Dwyer or Mr. Crawford was ready to pay the fine, and it is perfectly clear that if he had offered it, Mr. Trant would not have accepted it; since the question in agitation between them related entirely to the encroachment on the adjoining estate.

But it was argued, that it turned out in the result, that this was really an encroachment on the part of the tenant—that he had committed a wrongful act—that he had been aware himself of this wrongful act, and could not avail himself of his own wrong to suspend the payment of the fine. That does not at all vary the question. If the landlord had been at all anxious about the fine, if that had been the real object of contest between the parties, it was easy for him to offer to renew the lease on the old terms, in the language of the original lease, and without any prejudice to the question of encroachment. As the parties were really in litigation about another matter, and as there was no contest between them on this subject; as it is quite clear that the landlord would not have accepted the fine if it had been tendered, the failure in the condition to tender the fine, could

not, under those circumstances, be considered as depriving the party of his right to a renewal of this lease.

It is said that at a subsequent period in the year 1814 a tender was made. A tender might have been considered necessary, with a view to institute this suit, but if the party would not have accepted the money if offered to him, an actual tender on the part of the tenant was not necessary for the purpose of protecting himself against the forfeiture of his right to renew.

It is said that another life afterwards fell in. Mary Hughes died in 1812, but she died in the early part of that year while this correspondence was going on, and therefore that makes no alteration. As it appears to me as far as relates to the main question, the decree of the Court of Exchequer in Ireland was right.

A suggestion was thrown out in the course of the argument that in point of fact none of the lives were in existence: that as to Francis Annesley Hughes there was no proof that he was living; but it appears if it were necessary to go into that question that there is evidence of that fact; for a witness is interrogated as to whether or not Annesley Hughes, not Francis Annesley Hughes, but Annesley Hughes, named in the pleadings of the cause, is living; and he answers, that that Annesley Hughes, that is, the Annesley Hughes named in the pleadings in the cause is living. Now there is no Annesley Hughes named in the pleadings in the cause, but there is a Francis Annesley Hughes. That I apprehend is sufficient to identify that Francis Annesley Hughes, as being the party to whom the witness alludes, and whom he describes as the Annesley Hughes named in the pleadings in the cause, there being no Annesley Hughes, except the Francis Annesley Hughes to whom I have alluded.

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Another question arose in the course of this argument with respect to the form of the decree. There is no provision made in the decree against the Defendant with respect to the loss that has been sustained, in consequence of the breach of the covenant of the lease. It is contended that some provision in that respect ought to have been made. Now the facts as far as they relate to this part of the case are shortly these. By the original decree in the year 1815, the landlord was empowered to bring two actions, an action of ejectment, and also an action of covenant—an action for the purpose of trying the case as to the encroachment; and an action of covenant for the purpose of ascertaining whether or not there had been any breach of covenant, and if so, what damage had been thereby sustained. Those two actions were brought by Mr. Trant against Cooper Crawford, and those two actions were at issue when Cooper Crawford died. By his death there was an end of the actions, but it was very easy for the landlord to go on with the action of ejectment, for as O'Meara was the tenant in possession, all that it was necessary to do was to serve an ejectment, and he being served in ejectment, was willing to adopt the regulations which had been laid down by the court for the purpose of trying the ejectment. The ejectment therefore proceeded, a verdict was obtained, judgment was entered up, and Mr. Trant was put into possession of about 200 acres, which was the amount of the encroachment. So far, therefore, that part of the proceeding was effectual, but nothing was done in respect of the action of covenant, and it is perfectly clear that nothing could be done in respect of the action of covenant, without another step being first taken, but it was competent for Mr. Trant

to have applied to the Court, to put Mr. Dwyer under terms after the cause was revived, with respect to that action of covenant. The cause was revived early in 1818, and the final decree was not pronounced until the Summer of 1820. There was a period, therefore, of two years and a half after the revival of the suit in the Exchequer, during which time Mr. Trant might have applied for the purpose of putting Mr. Dwyer under terms, in order to try this question with respect to the breach of covenant, but he made no application for that purpose. I think, therefore, that as Mr. Trant took no proceedings for the purpose of obtaining the opinion of the Court upon those questions, it is now too late to find fault with the decree for making no provision with respect to the supposed loss upon the breaches of covenant. Under these circumstances the decree of the Court of Exchequer should be in all respects affirmed.

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Judgment affirmed, with 100*l.* costs.

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## ENGLAND.

(EXCHEQUER.)

JAMES HALL and others, - - - - *Appellants.*GEORGE SHEW - - - - - *Respondent.*

THIS was an action, brought in the Court of Exchequer for an excessive distress levied by the Plaintiffs in error on the goods of the Defendant in error, attended with very aggravated circumstances. Upon the trial of the action, a verdict was given for the Defendant in error, with 550*l.* damages and 40*l.* costs. In Easter term, 1827, upon a notice for a new trial the damages were reduced by consent to 400*l.* Final judgment was thereupon entered up, in Trinity term following. A writ of error being brought in the Exchequer chamber, the judgment was affirmed without argument.

Upon this affirmance a writ of error was brought in the House of Lords. The case was heard on the 5th of March, 1828, the Plaintiffs in error not appearing: whereupon the judgment of the Exchequer chamber was affirmed, with 120*l.* costs.

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SPAIN.

## ENGLAND.

(IN CHANCERY.)

JOHN HULLETT, and CHARLES WIDDER - *Appellants.*

|                                |   |                    |
|--------------------------------|---|--------------------|
| HIS CATHOLIC MAJESTY FERDINAND | } | <i>Respondent.</i> |
| THE SEVENTH, King of Spain and |   |                    |
| the Indies. - - - - -          |   |                    |

By a treaty between the governments of France and Spain, it is agreed, that France shall pay to the king of Spain a certain sum of money to be distributed by him among his subjects having claims against the government of France. This sum, by the terms of the treaty, is made payable to an agent to be appointed by the king of Spain. He accordingly appoints an agent, who receives the sum stipulated, and afterwards deposits part of it in the hands of merchants in London, in the name of his secretary. But accounts of the money so deposited are rendered by the merchants to the depositor, and not to his secretary.

Upon a bill filed in equity, in the name of the king of Spain as Plaintiff, against the depositories and the depositor, stating these facts, and praying a discovery, account, and payment of the money into Court, &c. the Defendants demurred upon the grounds of a defect of parties, and that a foreign sovereign cannot sue in a court of equity in England: held affirming the order of the Court below, that the demurrer was properly overruled; that a foreign sovereign may sue as Plaintiff in equity: and that under the circumstances of the case, it was not necessary that the *cestui que* trusts (the Spanish claimants) or the nominee of the agent should be parties to the suit.

Whether after the money has been brought into Court the parties having an interest in the final distribution could sustain a bill to effectuate their claims. *Quære.*

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ON the 22d day of December, 1827, a Bill in the name of the king of Spain as Plaintiff was filed in the Court of Chancery, against the Appellants, and one Don *Justo José de Machado.*

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The bill stated, That in the years 1814 and 1815, two public treaties, the one bearing date the 30th day of May, 1814, and the other the 20th day of November, 1815, took place between the governments of France, Russia, Austria, Prussia, and England, to which the government of Spain was an acquiescing party, whereby, (among other things,) the French government undertook to indemnify (in manner therein mentioned) the subjects of Spain in respect of the losses sustained by them in consequence of the invasion of the Spanish territories by the French government in the year 1808.

That a convention, bearing date the 25th day of April, 1818, took place between the governments of France, Russia, Austria, Prussia, and England, to which the government of Spain was also an acquiescing party, whereby, in order to effect the total extinction of the debts contracted by France, in consequence of the treaties, the French government engaged to cause to be inscribed in the great book of the public debt of France, from the date of the 22d of March, 1818, a *rente* of 12,040,000 *francs*, representing a capital of 240,800,000 *francs* of the money of the kingdom of France: And it was by the convention declared that the *rente* to be created by virtue thereof, should be divided amongst the therein-named powers, in manner therein mentioned; the portion whereof allotted to the kingdom of Spain, amounted to the sum of 850,000 *francs de rente*.

That although it appeared by the convention that in consideration of 850,000 *francs de rente*, or 17,000,000 capital in French inscriptions, the French government was exonerated from all claims on the part of the Spanish government by virtue of the treaties; and that the settlement of the claims of the subjects of Spain upon that fund, and the division

thereof, were to be arranged by Spain, by means of commissioners to be named for that purpose; yet in point of fact, such was not the case, in as much as, prior to, and at the time of, the execution of the treaty of the 30th of May, 1814, the governments of France and Spain had mutual claims one upon the other in respect of many particulars which are not mentioned or provided for in that treaty, which mutual claims formed the subject of an additional article bearing date the 20th of July, 1814, annexed to the last-mentioned treaty, and to which the respective governments of France and Spain were alone parties.

That with a view to the final adjustment of the mutual claims of the governments of France and Spain, a secret convention took place between the governments of France and Spain, by which it was recited that, in order to remove the difficulties calculated to obstruct, so far as Spain is concerned, the conclusion of the general arrangement which France is at present negotiating with the Courts which signed the treaty of the 20th of November, 1815, for the purpose of definitively settling and extinguishing the sum total of her debts to the subjects of the said Courts, as well as to the Powers, which were parties to the said treaty, and thereupon it was agreed as follows:—ART. I. The sum total to be paid by France to the subjects of His Catholic Majesty, whose claims are founded both on the treaty and the additional article of the 20th of July, 1814, and the stipulations of the convention concluded in conformity with Article IX. of the treaty of the 20th of November, 1815, is determined and fixed at 1,850,000 *francs de rente* in inscriptions upon the great book of the public debt of France, representing a capital of 37,000,000 of *francs*. ART. II. In case the part which shall or may be assigned to Spain, in the divi-

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sion to be made of the total sum which France will bind herself to the Courts which signed the treaty of the 20th of November, 1815, to apply to the payment of the claims of the subjects of the Foreign Powers, should be below the sum stipulated in the preceding Article, the French government engages to supply the means for making up the difference and completing the same. ART. III. The said sum of 1,860,000 *francs de rente* shall be divided into two equal parts, one of which shall be paid into the hands of such person or persons for that purpose to be authorised by the Spanish government, upon the same terms and at the same periods, as those determined with regard to the payments to which France shall bind herself to the other Powers; the other shall remain deposited in the hands of Commissioners appointed for that purpose in equal numbers on both sides, and who shall receive the interest accumulating in a compound ratio in favour of His Catholic Majesty's subjects, creditors of France, until such time when the mixed commission to be intrusted with the investigation and liquidation of the claims of His Most Christian Majesty's subjects against Spain, shall have terminated its labours, and when His Catholic Majesty shall have provided the needful means for the payment of the said claims. ART. IV. In order to remove all the obstacles which might retard the liquidation of the claims of the subjects of His Most Christian Majesty against the Spanish government, a special convention shall be concluded, having for its basis, with regard to the various classes of the claims to be admitted, and the mode in which the same are to be paid, the stipulations of the treaty, and the additional article of the 20th of July, 1814, and those of the convention of the 20th of November, 1815.

The bill then proceeded to state, that in pursuance of the secret convention, the Respondent appointed *Don Justo José de Machado*, (one of the liege subjects of Respondent, and then residing at Paris, and exercising the functions of Consul General from the Court of Spain to the Court of France,) the agent of the Spanish government, to receive the moiety of the sum of 1,850,000 *francs de rente*, which by the convention was to be paid by the French government into the hands of such person or persons as might be authorised by the Spanish government to receive the same; and that the French government had since paid over to *Machado* the whole of the moiety of the sum of 1,850,000 *francs de rente*, according to the secret convention; and that *Machado* had duly accounted for the same with the Spanish government.

That after payment to *Machado* of the moiety of the sum of 1,850,000 *francs*, the remaining moiety was left in the hands of the French government as a deposit, in pursuance of the provisions in the secret convention, in order that the same might be applied as directed by the convention; and that with a view of finally settling the mutual claims of the respective subjects of France and Spain, with respect to that fund, on the 30th of April, 1822, a convention was concluded between the governments of France and Spain, which recited that His Catholic Majesty and His Most Christian Majesty being alike animated with the desire of putting an end to the difficulties which have hitherto retarded the liquidation and payment of the claims of the subjects of His Most Christian Majesty against Spain, and wishing, with a view to the common benefit of their respective subjects, to settle the concern by a definitive adjustment, had for that especial end and purpose agreed, &c. as follows:—

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ART. I. In order to effect the reimbursement and total extinction of His Most Christian Majesty's claims, the payment of which is demanded from His Catholic Majesty in virtue of the first additional article of the treaty of the 20th of July, 1814, the sum of 425,000 *francs de rente*, representing a principal of eight millions and a half of francs (8,500,000), shall be deducted and taken by the French government from the sum which now lies as a deposit in the hands of the latter, and belongs to Spain in virtue of anterior conventions. ART. II. Upon the preceding stipulation being carried into execution, His Most Christian Majesty engages to discharge and satisfy the above-mentioned claims of his said subjects upon Spain, founded upon the first additional article of the treaty of the 20th of July, 1814, and His Catholic Majesty does thereby remain fully acquitted of and from all and whatsoever His Catholic Majesty owed to them in virtue of the said article. ART. III. Immediately after the exchange of the ratifications of the present convention the French government shall cause payment to be made into the hands of such person or persons as may for that purpose be authorised by His Catholic Majesty, of the overplus of the *rente* which the said French government kept as a deposit, including the whole amount of the compound interest that has hitherto accrued thereon.

That in pursuance of the last mentioned convention, the Respondent appointed one Don *Jose Noguera*, who had been employed by the Spanish government in negotiating the convention, the agent of the Spanish government to receive the surplus mentioned in Article III. of the convention, which surplus, exclusive of compound interest, amounted to a sum of 703,010 *francs de rente*, or 14,060,200 francs in inscriptions.

That the French government shortly after the ratification of the convention, and in pursuance thereof, paid over to *Noguira*, by inscribing the same in his name in the great book of the public debt of France, several instalments in respect of the surplus.

That *Noguira* was afterwards removed from his appointment, and *Machado* was duly appointed his successor therein, and that thereupon the French government paid over to *Machado* the whole or the greater part of the residue of the surplus, which had not been previously paid over to *Noguira*, by inscribing the same in the name of *Machado* in the great book of the public debt of France.

That *Noguira*, immediately after his removal from his appointment, transferred into the name of *Machado* the whole of the instalments which had been so inscribed in *Noguira*'s name in the great book of the public debt of France.

The bill then proceeded to state, that in the early part of the year 1823, a civil war broke out in the kingdom of Spain, and that in consequence thereof, *Machado*, (who was then residing at Paris,) some time in the course of the year 1823, sold out and converted into money the whole of the funds which then stood inscribed in his name in the great book of the public debt of France, in pursuance of the convention, and quitted France and came to England, having in his possession, either in specie or bills upon this country, the whole or the greater part of the proceeds of the sale, to the value of 500,000*l.* sterling.

That immediately upon the cessation of the civil war, with a view to secure the proper application of the funds, a royal decree was made and promulgated by the Respondent, on the 21st of March, 1824, directing the formation of boards for ascertaining and

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deciding upon the claims of Spanish subjects against the funds in question.

That in pursuance of the decree, two public boards, the one of them styled "The Board of Examination and Liquidation," and the other of them styled "The Board of Appeal," were appointed, and were both of them still in active operation; that Senor Don *Bruno Vallarino* was the president of the Board of Examination and Liquidation, and Senor Don *Anselmo de Ribas* president of the Board of Appeal; that both the boards held their sittings at Madrid; and that all the members comprising the respective boards resided at Madrid, without the jurisdiction of the Court of Chancery in England.

That shortly after the promulgation of the royal decree, a copy was sent to *Machado*, by the order of the Respondent; and at the same time an official dispatch was written and sent to *Machado*, by Count *D'Ofalia*, then secretary of state for foreign affairs in Spain, requiring him to transmit duplicates of the official letters which he might have transmitted to the constitutional government on the subject of his agency.

That in reply, *Machado* remitted to the Spanish government the accounts required, by which it appeared, that he had received on account of the Spanish government, by virtue of the convention of the 30th of April, 1822, a sum of 446,403 *francs de rente*; and that he had brought over to England, and then had in his possession, the proceeds thereof either in specie or bills, amounting to the sum of 500,000*l.* sterling.

That on the 15th of June, 1824, the Count *D'Ofalia* wrote and sent another official letter to *Machado*, signifying that the boards charged with the adjudi-

cation and distribution of the funds for the indemnification of the parties interested therein, being created, the funds must consequently be at the immediate disposal of the boards, subject to the necessary guarantee and security on behalf of the creditors.

That *Machado*, on the 11th of June, 1824, wrote and sent to Count *D'Ostia*, a letter, stating that he acted under an impression of the funds in question being the property of the parties concerned in the claims; and that he should be ready to pay thereout such claims as the boards might recognise as legal, and definitively liquidated, conformably to the treaties.

That on the 19th of July, 1824, a letter was written and sent to *Machado* by Don *Bruno Vallarino* and Don *Anselmo de Ribas*, whereby they directed *Machado* to deposit the funds then remaining in his hands in a public bank in England, at the disposal of the boards, as the representatives of the creditors, and for the liquidation of their claims, inasmuch as it would be attended with the advantage of producing to the general body of creditors an annual interest, which would increase the original funds for their benefit, and the funds would remain invested with all due security.

That on the 26th of November, 1824, *Machado* wrote and sent to Senors Don *Bruno Vallarino*, and Don *Anselmo de Ribas*, a letter, whereby *Machado* promised to deposit the balance of the monies then in his hands on account of the Spanish government (after deducting the expenses he had incurred) in the Bank of England, at the disposal of the boards, as the representatives of the creditors, and for the liquidation of their claims; and that the letter of *Machado* contained the passage following—"I deem  
"it incumbent on me to observe to you, that it ap-

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“ pears to me highly expedient, that no time should  
 “ be lost in proceeding to a definitive settlement of  
 “ this point, because, should the English subjects,  
 “ who are or conceive themselves creditors of our  
 “ government, on any grounds or account whatso-  
 “ ever, (and they are by no means inconsiderable in  
 “ point of number,) happen to discover the existence  
 “ of the funds, it is much to be feared that they will  
 “ resort to all possible judicial measures for the pur-  
 “ pose of paralyzing them, and whilst their claims  
 “ are in a course of discussion and decision before  
 “ these Courts, which will not only occupy a consi-  
 “ derable period of time, but also be attended by a  
 “ very heavy expense, the Spanish parties and legi-  
 “ timate owners of the funds will be deprived of the  
 “ enjoyment of their property, if not totally lose it.”

That Don *Anselmo de Ribas* and Don *Bruno Vallarino* thereupon wrote and sent a letter to *Machado*, whereby they directed him immediately to deposit in the Bank of England the resulting balance of the monies in his hands, then belonging to the Spanish government, placing it at the disposal of the boards, as the representatives of the creditors, and for the liquidation of their claims.

The bill then proceeded to state, that *Machado* did not, as required, deposit the balance; and that without the knowledge of the boards, or of the Respondent, and in direct breach of his duty as agent of the Spanish government, some time in the month of December, 1824, he deposited with the Appellants 200,000*l.* sterling, being part of the proceeds of the funds received by him by virtue of the convention of the 30th of April, 1822; and that the Appellants had not, at the time when the monies were so deposited with them, and had not then, and never had,

any just claims whatsoever either upon the said monies, or upon the funds received by *Machado* by virtue of the convention of the 30th of April, 1822, or upon the Spanish government in respect thereof.

That the Appellants had then, or ought to have, in their custody, possession, or power, the monies so deposited with them; and that the said monies then, according to the laws and constitution of Spain, justly and of right belonged to the Respondent, as the head and sovereign ruler of the Spanish government, to be applied by the Respondent, as such head and sovereign ruler, according to the provisions for that purpose contained in the treaties of the 30th of May, 1814, and the 20th of November, 1815; and that the Respondent had by his agents applied to the Appellants, and requested them to furnish the Respondent with an account of the monies which were so deposited with them, and of their application thereof, and to pay over the amount thereof to the Respondent, or his agents, in order that the same, when so received, might be applied according to the provisions contained in the treaties.

The bill also contained charges that the Appellants admitted that *Machado* had paid over to them part of the funds: that the whole of the funds delivered by *Machado* belonged to the Respondent, to be distributed by him pursuant to the treaties: that *Machado* in November, 1823, inserted a paragraph in a public newspaper called *Le Constitutionnel*, denying assertions of his having placed the funds at the disposal of the constitutional government, and stating that the funds belonged to the claimants under the treaties.

The bill further charged, that the several boards of examination and liquidation, and of appeal, were then still subsisting, and actively engaged in the ex-

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amination of the claims of the subjects of Spain, founded on the several treaties, upon the funds which the government of France contracted to pay to the Spanish government by the convention of the 30th of April, 1822, but that none of such claims had been then definitively liquidated and allowed; that the Appellants had not, and no one could have any claims upon the funds, unless the same were grounded upon the treaties; that such claims were altogether of an equitable nature, and could not be properly determined except in a Court of Equity, if any court of justice in England could take cognizance thereof.

That the Appellants alleged, that the monies were deposited with them, by *Machado* as the agent and in the name and on the behalf of one *Achilles de Pereira*; whereas *Pereira* had not then, nor ever had, any claims whatsoever upon the monies, and that *Achilles de Pereira* was at that time, and had ever since been, and then was, the secretary of *Machado*, and that the monies were so deposited in the name of *Pereira*, solely for the purpose of preventing any attachment or other legal process.

That *Pereira* was then residing in the Netherlands with *Machado*, beyond the jurisdiction of the Court; that the Appellants had never disposed of any part of the monies deposited with them, except under the express direction of *Machado*, and had always acknowledged themselves to be the holders of the monies merely as the trustees and agents of *Machado*; that in the month of January, 1826, they delivered an account to *Machado*, containing a statement of the payments made by them on account of *Machado*, out of the monies so deposited with them, and also an account of all the monies so deposited, making a balance of 100,000*l.* in favour of *Machado*, which balance the Appellants then had in their hands.

That the funds were in great danger of being wholly wasted and lost, unless the same should be immediately ordered to be paid into the Bank of England, in trust in the cause.

That the monies, were deposited in pursuance of a fraudulent concert, between *Machado* and the Appellants, and for the purpose of withdrawing the funds from the claimants, who might ultimately be declared entitled thereto: that when the monies were deposited with them they well knew, or suspected, that the same were not the proper monies of *Machado*, but that they were actually part of the proceeds of the funds so received by *Machado*, by virtue of the convention of 30th of April, 1822, and then actually belonged to the Spanish government, to be applied by that government in manner thereinbefore mentioned; that *Machado* had no right or authority whatsoever to deposit with them any part of the proceeds of the funds; and that in so doing, *Machado* was committing a direct breach of trust.

The bill also charged that *Machado* was without the jurisdiction of the Court, but intended shortly to return to England, and to commence legal proceedings against the Appellants, for the purpose of recovering from them the monies deposited with them, and thereupon to apply the same to his own use: That the Appellants threatened and intended to apply the monies to their own use: That the monies ought forthwith to be paid into the Bank of England for safe custody, for the benefit of all parties who should be declared ultimately to be entitled thereto, or otherwise that the same ought forthwith to be paid over to the Respondent, or his agents: and that the Appellants ought in the meantime to be restrained by injunction from disposing of the monies, otherwise than under the direction of the Court.

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The bill finally charged, that *Machado* and the Appellants then had in their custody, &c., accounts, &c., which they refused to produce.

The prayer was, that the Appellants, and *Machado*, when he came within the jurisdiction, might answer the matters of the bill; and that an account might be taken of all the money which had been deposited with the Appellants by *Machado*, &c., and that the amount thereof might be ascertained, and paid over by the Appellants to the Respondent, or his agents, or otherwise that the Appellants might be ordered forthwith to pay the same into the Bank of England, in trust in the cause; and that *Machado* might in the meantime be restrained, by injunction, from commencing or prosecuting any action, or taking any steps against the Appellants, for the purpose of obtaining repayment of the monies deposited with them; that the Appellants might also be restrained from paying over the monies to *Machado*, or parting with the same, without the direction of the Court; that the Appellants might set forth the claims (if any) which they had upon the monies deposited with them, or upon the funds received by *Machado*, by virtue of the convention of the 30th day of April, 1822, and the particulars thereof, and how they make out the same; and that the said claims might be disposed of by the Court.

Process to appear to and answer the bill was prayed against the Appellants, and *Machado* when he should come within the jurisdiction of the Court.

The Appellants appeared to the bill, and on the 31st day of January, 1828, filed a Demurrer, and for cause of Demurrer shewed, that the Respondent had not by his bill made such a case as entitled him in a Court of Equity to any relief against the Appellants,

or either of them: and for further cause of Demurrer they showed, that the Respondent had not made *Achilles de Pereira* a party thereto, nor prayed process against him; neither had the Respondent made parties to the bill, nor prayed process against any or all of the persons who, according to the statements in the bill, had or were entitled to claim a beneficial interest in the monies in the bill mentioned, or some part thereof.

The Demurrer came on to be argued on the 22d of March, 1828, before the Lord Chancellor, when it was ordered and adjudged that the Demurrer should be over-ruled, and that the Appellants should have a month's time to put in their answer.

From this order the appeal was presented.

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For the Appellants.—*Mr. Pepys* and *Mr. Russell*.

For the Respondents.—*The Attorney General* and *Mr. Horne*.

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*For the Appellant.*

It has never been held, that a Foreign Sovereign can sue in Courts of Equity in England; and according to the principles of such Courts, such a plaintiff ought not to be allowed to sue therein, inasmuch as by no possibility can process be issued with effect, or equity done, or a decree enforced against him. The pretended rights, on which the Plaintiff in this bill relies, are rights which he claims merely by virtue of his prerogative as King of Spain; and it is not according to the law or constitution of England, that an English Court of Equity should be made instrumental in enforcing in England the prerogative of a Foreign Sovereign. The pretended right of the King of Spain to the monies sought to be recovered by the bill arises out of

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a treaty with France, which was inconsistent with the existing relations between each of those countries and his Majesty the King of this country. An English Court of Equity, therefore, will not lend its aid to enforce any such pretended right. This is a bill in Equity, according to the statement of which not one of the parties before the Court has any right to the beneficial enjoyment of the property which is the subject of the suit, and no decree could be made upon it, which would do complete justice. The bill does not bring before the Court all the parties interested in the matters of the suit, and in the questions raised by the statement in the bill, nor any persons who represent those parties or their interests. *Achilles de Pereira* is not made a party to the suit, though the bill states, that the monies of which the plaintiff seeks to obtain possession, were paid to or deposited with these appellants in the name of *Achilles de Pereira*.\*

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In the course of the argument the Lord Chancellor made the following observations.

*The Lord Chancellor.*—The treaty on the subject of the claims of French subjects, creditors of Spain, says that the sum of one million eight hundred and fifty thousand *francs de rente* to be received, shall be divided into two equal parts, one of which shall be placed in the hands of persons appointed by the Spanish government to receive it, and the other is to remain in France, and is to be deposited there for the purpose of meeting the claims which the subjects of France have on the government of Spain.

Half of the fund was to remain as a species of secu-

\* The Judgment was given at the close of the argument for the Appellant. Such parts of that argument as are not stated above, are incorporated in the observations made by the Chancellor during the argument.

city to the French government, that the Spanish government would pay the claims of the French subjects on the Spanish government. Half of the entire sum stipulated by the convention was to remain in deposit as a security for the purpose of guarding against any default on the part of the Spanish government, with respect to any claims of the French subjects under that commission. It was divided by agreement between the governments.

It has been argued\* that political reasons might have rendered it necessary to recognise the right of some other sovereign; and a case has been supposed, of a bill filed when the French were in possession of Spain, by the individual who exercised the authority over Spain, at that time; the individual who here appears as the Plaintiff, asserting his title as King of Spain, being no doubt deposed from his throne by power, not by right; his father then living, and claiming the throne against the person in possession, and his son against both: as to this and the objection that the title of Ferdinand may be disputable, it is admitted upon the record that he is the King and sovereign ruler of Spain.

That a King is entitled to sue as a King cannot be disputed. As a suitor he submits himself to the jurisdiction of the Court, otherwise it might be an objection that you could not control him. But if he comes here as a suitor, he submits himself to the jurisdiction. Has not the sovereign power of another country the common privilege of mankind? Do you say that by the law of nations he is deprived of that privilege being the King of Spain?

As to the doctrine in *Barclay v. Russell*, † are there not some opinions pronounced in some of

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\* By Mr. Pëpys. † 3 Ves. 431. See the note in p 58.

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the cases\* by Lord Eldon on the *dictum* of Lord Rosslyn in the Judgment given in that case.

As to the objection that the *cestui que trusts* are not parties, it does not appear that any of the claims are ascertained, and all the claimants are abroad; it does not appear that any of the claims are yet substantiated.

Do you mean to say, that the King of Spain is not entitled to take money out of the hands of his own agent, having by his authority received the money from the French government?—It is alleged by the bill, that the person appointed to receive this money, was the agent of the King of Spain, and we must take it as a fact. Whose agent was he, if not the agent of the King of Spain?

The French government expressly stipulated, that they will pay the money into the hands of such person as shall be named by the King of Spain. The King of Spain appoints *Machado* as his agent, and by virtue of that agency and appointment, the French government allow him to inscribe the *rentes* in his name, and he is allowed to act as the agent of the King of Spain. Only consider it. An arrangement is entered into, not between the subjects of Spain, creditors of France, and the French government, but the King of Spain and the King of France, which ultimately the subjects of the King of Spain were to have the benefit of, but the acting parties were the head of the respective governments.

Why are we to assume on this record that the King of Spain is suing for the purpose of destroying the right: we are rather to assume that he is suing to establish the right. *Machado* takes possession of this money and gets out of the reach of the King of Spain

\* See *Dolder v. Lord Huntingfield*, 11 Ves. 268.

and the creditors. You will find, taking the whole of the record as it stands, the transaction is this; the government of France contracts with the government of Spain, to pay the government of Spain a sum of money which is to be eventually distributed among certain persons who are the subjects of Spain, who have sustained losses and injuries in consequence of the invasion by France, of Spain. By that treaty between France and Spain, the King of Spain is the party to see the money properly applied; he is the party to see to its application. These very tribunals which are established for the investigation and liquidation of these claims are tribunals established by the will and arbitrary act of the King of Spain. He it is who establishes the tribunal of liquidation. He it is who establishes the court of appeal. They were not existing tribunals; they are tribunals established by him and under his authority. He is to see, as the governing power of that country, to the application of these funds. In the mean time these individuals under his authority get possession of the funds as agents. Then is not the King of Spain (provided a king can sue in our municipal courts) is he not entitled to come here and sue for the money so obtained?

As to the objection that two of the parties to the general treaty had no right to alter that treaty by a private convention, to the prejudice of the parties beneficially intitled under the general treaty, the question is, what construction a court of law would put on the treaties taken together, and not merely on particular passages. The government of France having a counter claim against the government of Spain, by the treaty of 1815 say to the government of Spain, although I agree to pay you this sum, I shall keep it in deposit as a security for the liquidation of the claims of my sub-

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jects on you; and the moment you liquidate those claims, the funds shall be handed over to you, and in order to prevent the delay and inconvenience that might be occasioned by the investigation of those claims which France had on Spain, it is at last agreed that France should take upon herself the liquidation of those particular claims, and that the residue of the money should be at once paid over to Spain. There is first a general treaty to indemnify: then comes this private treaty, in which they agree between themselves whatever may be the amount of the claims arising upon the public treaties that this particular arrangement should take place between these two powers. Then comes the treaty of the 21st of April, 1818, by which 850,000 *francs de rente*, were allotted to Spain; but Spain had in the mean time provided, in a secret treaty with France, for a different sum.

Supposing the private treaty to be in contravention of the public treaty, do you mean to say that would apply to a question between the King of Spain and his own agent, having received money under that treaty? is that a defence which the agent could set up? I am not quite sure that the transaction was not in all other respects free from all objection. There were counter claims; they agree that the claims which the Spanish government have on France shall amount to so much, on the other hand you have a counter claim on Spain; the question would be whether the 850,000 francs applied only to the claims on the one side, or the balance of account between the parties. If it was to be applied to the balance of account, it was quite unnecessary to ascertain it.

June 18th.

*The Lord Chancellor.\**—It is argued that the pri-

\* The following observations were made during Mr. Russell's argument.

vate treaty was a fraud upon the parties to the public treaty, and the parties materially interested in it: but it appears that the fund of 850,000 *francs de rente* was stipulated by the public treaty for particular objects, and for particular claims; and it is with reference to those mutual claims not provided for in that treaty, that the two powers came to an agreement that these mutual claims not included in the sum stipulated by the general treaty, should be regulated and fixed at a certain amount. What is there fraudulent in that? There were other claims not included in the original treaty which led to the alteration of the sum, which is provided for by the secret treaty; that there were mutual claims not included in the other treaty, must be taken as a matter of fact on this record, that is a ground therefore for the treaty regulating the sum at an amount different from that which is contained in the general treaty. What is there fraudulent in that, even supposing that we could enter into the question upon this record, and with reference to this subject? Suppose it had been a transaction between private parties, what is there fraudulent in it? It has reference to particular objects. The record states what must be taken as a fact on the demurrer, that there were other claims. By your demurrer you admit this statement to be correct, that there were mutual claims one on the other, in respect of many particulars not mentioned or provided for in that treaty; how then can you say it is a fraud? A certain sum remains as a deposit in France, and an agreement was come to between the King of Spain and the King of France; with respect to the sum so in deposit, and the French government in consideration of being allowed to take to their own use a certain part of that sum, agreed to pay over the rest to such persons as should

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be nominated by the King of Spain to receive it. The King of Spain nominates *Machado*, and he receives it; and then he says he is not accountable to the King of Spain.

The whole transaction shows that the boards as they are called, can have no property in the fund. They are merely boards of liquidation, a species of tribunal established for the purpose of ascertaining the amount of the claims; they have no interest in the property; they were merely acting judicially.

The effect of the letters is nothing more than an admission on his part, that he is in possession of the fund. It is an admission on the part of *Machado*, that he got possession, (as appears also by the record,) under the authority of the King of Spain. The only contractors in these treaties are the governments of the two countries. Whatever the subjects take, they take by virtue of the treaties entered into by these governments. The subjects have nothing to do with it; the governments are parties to the treaties, and they are entitled in the first instance to the money; there is no such thing as a treaty between the governments of one state, and the subjects of another state. It is the money of Ferdinand, in the first instance he has the control over it, it is he who is the contracting party. It is his duty as the King of Spain, to distribute it to the subjects. We cannot assume that he will not so distribute it, we have nothing to do with that question. We cannot assume that Ferdinand, when he is in possession of the money, will not distribute it, according to the spirit of the treaty. In fact he has established tribunals for that purpose; but we cannot enter into that question at all. It is money belonging to Ferdinand under that treaty, received by *Machado* by the authority given to him by Ferdi-

nand, and he is accountable to Ferdinand for it, whether it is, or is not his property.

As to the case of *Mendizabel v. Machado*, it is different from this case. There *Machado* being in possession of this money, some bills were drawn upon him by *Mendizabel*, and the money was under those bills to be applied to some objects, foreign to the treaties and the trust. The decision rested upon the misapplication of the funds. In this case it appears that there are tribunals established for the purpose of liquidating the claims, arising under the treaties. That there are tribunals appears on the record, and the claims are in a train of settlement.

It has been asserted that no case has occurred, in which a sovereign was permitted to sue in the municipal courts of England. Can no case be found in which the King of Spain has sued at law? What is that case in Rolle's reports,\* where he was directed to bring an action of trover, and he did so? In another case there was a bill filed by the Ambassa-

\* The case is mentioned in Rolle's abridgement, Tit. Court de Admiraltie, E. 3. Ils (the Court of Admiralty) ne poient tener plea d'un suit per le Roy de Spaine, pur succider de Brasill bois en Brasilia pur ceo que est sur le terre, Hill. 12. Ja. B. R. enter le Roy de Espaigne et Pountes resolve et prohibition graunt et ceo après trie al common ley en un trover et conversion. See 2 Bulst. 322.

In Rolle's Reports, p. 133, the case is again mentioned.

Where after reciting the application for and the granting of the prohibition, the report goes on thus:—P. 13. Ja. le Court fut de mesme l'opinion, mes tenus per Coke et Doderidge que l'Embassador puissoit aver action pur ceo en cest court et al auter jour le Counsell del Embassador vient en Court et dit que il voilt successer son suite en l'Admirall Court et port action icy, per que fut order per *Curiam* per consent des parties accordant et issint nul prohibition grant et puis le Roy de Spaine port action vers luy en B. R. See Bulst. 322, s. c.

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dor of the King of Spain, but the bill was dismissed on the ground that it ought to have been filed by the King of Spain.\*

Suppose the King of Spain were to send jewels to be set to Messrs. Rundell and Bridge, and the jewellers were not to deliver them up to the King, do you mean to say that the courts of the country could not interfere? that the King of Spain could not recover the jewels? do you think there would be no redress in a case of that kind?

The action was not by the Ambassador. How can an Ambassador bring an action at law? the party was never in possession of the property. If you look at the reports in Rolle's, Bulstrode, and Rolle's Abridgment, you will see in some places it is intitled the

\* See the *Spanish Ambassador v. Bingley*, Hob. 113. The bill was filed in Chancery by the Spanish Ambassador, as Plaintiff suing for all the King of Spain's subjects, for the recovery of goods which were stated to belong to such subjects generally, and not to any individuals named. To this bill a demurrer was filed; and the matter was referred by the Lord Chancellor to the Judges of the Common Pleas, who thought that the Ambassador ought not to be answered. The case was afterwards tried by consent, in a course prescribed by the Judges, and forming no precedent as to jurisdiction.

There had been a previous proceeding in the same matter, which is reported in Hob. 78, under the title of *Don Diego Serviento de Acuna, Embassador Leiger* for the King of Spain, against *Jolliffe, Tucker, and Sir Richard Bingley*. The Plaintiff sued in the Court of Admiralty, as procurator general for all his master's subjects; stating in his libel a case of piracy, by Jolliffe and Tucker, against ships with cargoes, of subjects of the King of Spain; and that the ships, &c. were taken into a port of Ireland, and came to the hands of Sir Richard Bingley, who converted them to his own use. A prohibition was prayed, and "Montague, the King's serjeant for the Embassador, said that he could not sue for these goods at common law, because he was not proprietary." See Hob. p. 113.

*King of Spain v. Pountes.* How could an Ambassador bring an action of trover, the property never having been in his hands.

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Has the record been examined in the case cited from Rolle, to see whether the Ambassador was the Plaintiff on the record? It was brought by his direction very likely, but how could an Ambassador bring an action for property belonging to the King? it is quite out of the question. I wish to point your attention to that case in Hobart,\* in which the bill was dismissed on the ground that the bill should have been in the name of the King, and not in the name of the Ambassador, as the Ambassador was the agent to the King for political, but not for private purposes. Have you observed what Lord Kenyon says in *Ogden v. Folliot*?† These are his words, “if we were to “consider the acts of the province of New York as “binding as has been contended, I am at a loss to “know why all the property of those persons which was “said to be confiscated, did not pass to the executive power of that state, to whom it was said to be “forfeited, and why an action might not have been “brought in the name of such executive power, to enforce the payment of this bond.”‡ I think you will find in one of those cases (I have not the books here,) that the King of Spain brought an action of trover against a party who had got possession of some property, and he recovered. It is quite clear it must be in his own name. There are several other cases be-

\* Hob. 113, ante, p. 54, note. † 3 T. R. 731.

‡ He said also, “if the treaty of peace has reference to the “first declaration of independence, the bond in question was lawfully transferred to the executive power; and if so, I do not see “why an action may not be brought.”

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sides that. What reason can you give why the King of Spain should not maintain an action ?

It is argued that the Allies, including England, abandoned part of their claims for the purpose of exonerating France, and that the arrangement could not be altered by a private convention which increased the charge.

Supposing any thing to turn on that view of the question, by what documents does it appear that this country abandoned any part of her claim ? It does not appear that any party abandoned its rights for the purpose of getting rid of the liabilities on the part of France ; but they agreed to fix their claims at certain specified sums. There might be a clear gain by fixing on a precise sum. What is the fact ? How has it turned out ? Is not the sum larger than the claims which have been allowed ? I do not think the parties to the general treaty abandoned any claims ; there is nothing to shew such abandonment ; it is a mere arrangement.

I have directed your attention to what is said by Lord Kenyon, and the case in *Rolle* ;\* can you state any opposing authority ? I think we may assume that a sovereign can bring an action at law. As to the case in *Hobart*,† the objection was that he could not maintain a suit in the name of the Ambassador instead of his own name. The matter was disposed of by the Court upon agreement between the parties. It was not a case of regular jurisdiction.

There was a case‡ from the canton of Berne, in which certain persons filed a bill on behalf of them-

\* 1 Rolle's Rep. 133, ante, p. 53.

† *Spanish Ambassador v. Bingley*, Hob. 113, ante, p. 54.

‡ *Dolder v. Lord Huntingfield*, 11 Ves. 283.

selves and the canton of Berne: the only objection made, was that it was a bill not filed by an established government recognized by this country.

As to the objection that in the case of a sovereign justice cannot be done; if he appears as Plaintiff, you can do complete justice—you can impose any terms you think proper—you have him in your power—you may file a cross bill, and then you have him completely under your control and jurisdiction.

In the case of the *Colombian Government v. Rothschild*, the objection was that it was not a proper designation of the executive. I was not aware that the present Master of the Rolls had expressed himself so strongly;\* but it is quite clear from the observations of the Judge, that if there had been a proper designation of the executive they would have had a right to sue.

In the case of *Dolder v. Lord Huntingfield*, the Lord Chancellor, speaking of Maryland, says, “that  
“state was only a corporation under the great seal dissolved by means which a court of justice was obliged  
“to consider rebellious, and then the transfer of the  
“title from Maryland to any other state was a question  
“a court of justice could look at as a question of law  
“only in one way, and the principle was that the Court  
“could not admit that the title passed to the independent states of America by an act which we are obliged  
“to call rebellion.” He goes on to say with respect to

\* The expression alluded to, is in the case of the *Colombian Government v. Rothschild*, 1 Stu. 94. The report of the Vice-Chancellor's judgment contains the following passage: “A  
“foreign state must sue in the names of some public officers who  
“are intitled to represent the interests of the state, and upon whom  
“process can be served by the Defendants.”

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that case\* before Lord Loughborough, "the question "of merits is not decided by the Maryland case, which "does not touch such a case as this, a foreign independent state." The inconvenience in many of the cases has arisen out of the shape of the record, but the Lord Chancellor admits most distinctly in that case, that an action can be brought or a bill filed in the name of an independent power, or the executive power of an independent state.

As for the objection that the money might be recovered at law, *Machado* is the agent, and he received the money as agent of the King of Spain. The jurisdiction is concurrent, and they want discovery and account.

The *cestui que* trusts are not necessary parties, for there is no person who has established any right as appears by the record itself. It is stated that there is no person who has yet established a claim; therefore, there is no person whom you can make a party to the record.

As to the necessity of making *Pereira* a party, is it stated that the funds are now in the name of *Pereira*? Is it stated that *Pereira* acted as the agent of *Machado* in paying the monies over, or that he has any interest in them at all? They were deposited in the name of *Pereira*, *Pereira* being out of the jurisdiction of the Court.

It is stated on the face of the record that *Pereira* had no interest—he did not claim any interest. All

\* *Barclay v. Russell*, 3 Ves. 431: in the report of which the following passage occurs: "I wish it to be considered whether "any foreign sovereign under any denomination, can sue in a "municipal court of this country. Whether it is not matter of "application from state to state. I doubt, whether in a municipal "court the right of a sovereign independent state can be recognised."

the circumstances which are connected with paying it over, and every thing relating to it, shew distinctly that he had no interest and no claim whatever. All that is admitted by the demurrer. There is no colour of interest, provided it is stated how, and under what circumstances it is paid. Take it as a naked fact unaccompanied with other circumstances there may be a colour of interest ; but you are not to take a part of the averment and reject the rest—you must take the whole—you must take the whole averment together—and the whole averment is admitted by the demurrer to be true. The Master of the Rolls, it is said, has decided\* that where it appears on the face of the bill a party has an interest, but it is averred that he is out of the jurisdiction of the Court, it is necessary to pray process against him. But there is no colour of title in *Pereira* on this record.

It has been argued that the trusts of the original treaties have never been rescinded by competent authority. Upon that point the case stands thus : In the original treaty there was no particular sum stipulated. France was to indemnify the subjects of the different powers for the amount of their claims ; then there was to be a mixed commission to adjudicate the amount of the claims. It was afterwards considered most convenient that a precise sum should be appropriated by France : there was an end of the mixed commission ; and the surplus under such circumstances belonged to the respective powers. However, that has nothing to do with the present

\* ——— v. *De Tastet ex relat.* Mr. Russell (not reported). See *Windsor v. Windsor*, 2 Dickens, 707. But see *contra Haddock v. Tomlinson*, 2 Sim. and Stu. 219. and Red. Ch. Pl. 134. See also upon the general question as to parties out of the jurisdiction, *Fell v. Brown*, 2. B. C. C. 276. and the *Att. Gen. v. Baliol College*, cited in Red. Ch. Pl. 25.

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question, there is a subsequent and distinct arrangement made by France with Spain, by which it is agreed that a part of this sum of money on which France had certain claims, should be paid to France, and the rest be paid over and be the property of the King of Spain, that is the distinct language of the treaty. France has certain claims against Spain, and she did not choose to part with the fund till those claims were liquidated. In the mean time the fund was to remain in France accumulating in compound interest for the benefit of the Spanish claimants until the claims which France had were liquidated. Then, Spain and France, by a subsequent treaty, agree to put an end to this arrangement, the French agreeing to take a part of these funds in liquidation of the claims of the French subjects, and the remainder of the sum was to be paid over to the Spanish government. That was the final arrangement—it was under that arrangement that *Machado* received the money. It is quite clear from this final arrangement that France abandoned all claim on the fund.

*Lord Redesdale.*—This is one of the clearest cases that can possibly be stated. I conceive that there can be no doubt that a sovereign may sue. If he cannot, there is a right, without a remedy; for it is only by suit in Court, that the Respondent can obtain this money: he sues as every sovereign must sue, generally speaking, either on his own behalf, or on behalf of his subjects. If the courts of justice were to refuse to receive his suit, I apprehend that it might be a just cause of war. All transactions on behalf of nations, must be transactions with the sovereign power of those nations: it cannot be transacted otherwise, and what is the subject of the present suit? If any person had a right to object to the authority of *Machado* in receiving this money, it was the government

of France. The French government did not object to it: they paid the money to *Machado*, and he is put in possession of the fund. *Machado* receives it as the agent of the King of Spain: it was in that character alone that he received it. The only persons who had a right to dispute the authority of *Machado* to receive it, was the government of France, and the government of France did not dispute it. *Machado*, having received the money, deposits it in the hands of Messrs. Hullett and Brothers; and the single pretence, on which there can be the slightest objection in this case, is, that he deposited it in the name of *Achilles de Pereira*. This man, it is stated, was a person whose name was made use of by *Machado*, for a particular purpose, and it is so admitted by the Appellants in this case. It is stated that the Defendants have rendered all the accounts to *Machado*, and never pretended that this man had any interest in the fund in their subsequent transactions with *Machado*. The bill states, therefore, that this is a mere pretence on their part, and that in truth they have acknowledged *Machado* to be the person to whom they are to be accountable. Who is *Machado* on the statement of these proceedings, but the agent of the King of Spain, in his sovereign capacity? It is in his sovereign capacity that he appoints *Machado* as his agent, and *Machado* is responsible to the King of Spain. Having received the money in this character, what have the Appellants to do with all these treaties? Nothing: as I apprehend. They have this money in their hands, as the depositaries of *Machado*, the agent of the King of Spain; that is the truth of the case, as appears on the record.

Under these circumstances, therefore, the Appellants ought to answer this bill, and to say what is the

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money they have in their hands, and to pay that money as the Court shall think fit to direct. If there existed such claimants as are stated, and who might perhaps, some of them, be sufferers if the money was disposed of, without the control of the Court, the bill only prays that the money should be paid into Court; and if there are any persons who have claims, the money being there, they may exhibit any suit they think fit for that purpose: but that is no reason whatever why the Defendants should not answer this bill, admitting what money is in their hands, and paying that money into Court. I conceive, therefore, that this Demurrer ought not to be allowed. Such has been the decision of the Court below, and I am disposed to move your Lordships to affirm that decision; for I cannot find any ground whatever, on which it can be resisted.

As to the proposition that a sovereign Prince cannot sue, it would be against all ideas of justice. In what manner is this money to be got out of the hands of the Defendants, if a sovereign power cannot sue for it. He is bound with a trust for his own subjects when he has obtained the money; but with the execution of that trust you have no more to do, than you would have in many proceedings in this country: as where Commissioners are appointed, for the purpose of adjusting claims between different governments, with respect to which you would not interfere in courts of justice; because the sovereign power of the country must have a power to appoint proper boards for that purpose. It is stated, that such a board is appointed, and that board is in Spain, and not amenable to the jurisdiction of this Court. I cannot, therefore, find any ground on which these parties can refuse to answer this bill; certainly, in honesty, they cannot refuse; they do not pretend, they cannot

pretend, that the money is their own. By answering the bill, and submitting to pay the money into Court, they would be free from all further responsibility, and then it would remain to be disposed of, as might be just.

If there were such persons as is suggested having claims on this sum of money, and they had a right to institute a suit on the subject, it would be their business to institute that suit; but at the same time I should doubt extremely whether the Court of Chancery could entertain such a suit under the circumstances, any further than to order the transfer of these funds to the boards which the bill states are constituted by the King of Spain for the purpose of liquidating the claims of his subjects with respect to that fund. What has been done in this country, where boards of a similar description have been instituted? The sovereign power of every state must be entrusted with such an authority, and there cannot be any transaction between nation and nation carried on if this Demurrer should be allowed. It is a transaction of such a description, that the right necessarily accrues to the sovereign power in Spain. That the Spanish sovereign is a trustee for his own subjects, may be true; but the Court of Chancery cannot enforce properly that trust. The hand entitled to receive the fund, according to what may be deemed the law of nations, is the King of Spain, or the person whom he appoints for that purpose. Accordingly, the French government allowed *Machado*, as the agent of the King of Spain, to receive the money; and the French government were the only persons who had any right to dispute the authority of *Machado* to receive it. *Machado* did receive it, under the authority of the King of Spain, and the money is now in the hands of these persons, under the autho-

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rity of *Machado*. On these grounds I submit that this Demurrer ought to be over-ruled.

An objection was made that *Pereira* was not a party. There is a statement in the bill sufficient to shew that he has no interest in this money, and the circumstances which are stated, must be considered as admitted by the Appellants in their Demurrer. They admit, therefore, that so far from this man having any interest in the fund, the Defendants have constantly rendered their accounts, not to him, but to *Machado*; that is the statement in this bill, therefore they have themselves, by admitting that statement in the bill, admitted that this man has no interest. On these grounds it appears to me, that the decision of the Court below is right, and therefore I move that the judgment pronounced by the Court below be affirmed. I do not wish you to consider my opinion as of considerable force on this subject, but it certainly is a subject, on which, in the early part of my professional life, I bestowed a good deal of pains and attention.\*

*The Lord Chancellor*.—I see no reason to alter my opinion, the grounds of which I have stated in the course of the argument.

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Judgment affirmed, without costs.†

\* See the learned argument of Lord Redesdale, (then Mr. Mitford,) and his colleagues, in the *Nabob of the Carnatic v. the East India Company*. 1 Ves. J. 379.

† The reason given was the dignity of the Plaintiff.

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(ENGLAND.)

(COURT OF KING'S BENCH.)

The Reverend EDWARD DRAX FREE, D. D.  $\left\{ \begin{array}{l} \textit{Plaintiff} \\ \textit{in Error.} \end{array} \right.$

MONTAGUE BURGOYNE, Esq. - *Defendant in Error.*

The Stat. 27 Geo. 3. c. 44. intituled, an act to prevent frivolous and vexatious suits in Ecclesiastical Courts, and reciting in the preamble, that it is expedient to limit the time for the commencement of certain suits in the Ecclesiastical Courts, enacts, (among other things), that no suit shall be commenced in any Ecclesiastical Court for fornication or incontinence, after the expiration of eight calendar months from the time when such offence shall have been committed.

Upon a libel in the Ecclesiastical Court against a clergyman, containing various articles charging fornication, &c. ; and in the concluding article willing that the offender be duly and canonically *punished* and *corrected* according to the exigency of the law, &c., an objection taken to the jurisdiction on the ground of the Statute 27 Geo. 3. c. 44. was overruled in the Ecclesiastical Court : whereupon a writ of prohibition was obtained in the Court of King's Bench, and upon declaration in prohibition, demurrer, and argument, it was held that the statute applied only to proceedings against fornicators, &c. whether Laymen or Clergymen, *pro salute animæ* ; but that a proceeding in the Ecclesiastical Court on the ground of fornication, against a clergyman, for the purpose of deprivation, is not prohibited by the statute, and this judgment was affirmed on appeal.

Held also that the judgment of the Court of King's Bench being for a prohibition, against proceeding on the ground of fornication *pro salute animæ*, but granting a consultation so far as the case related to the proceeding for deprivation, the statute 8 and 9 W. 3. c. 11. which gives costs to the party who obtains the judgment in prohibition, did not apply, inasmuch as it was a qualified judgment, which in substance was for the Defendant in the prohibition, and that if it was to be considered as a *casus omissus*, there was no authority in the Court to give costs.

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**THIS** was a Writ of Error brought to reverse a judgment\* of the Court of King's Bench in an action of Prohibition. The Plaintiff in Error was Rector of the Rectory of the parish of Sutton, in the county of Bedford. The Defendant in Error was one of the Parishioners.

In October, 1824, the Defendant in Error exhibited articles in the Arches Court of Canterbury against the Plaintiff in Error, charging acts of fornication and incontinence, committed by him, with several of his female servants, in the years 1810, 1812, 1814, 1815, 1817, and 1822, and also that on several occasions during the above, and in the intervening years, he had been guilty of various other acts of gross immorality and neglect of his clerical duties.

The Libel consisted of thirty-one articles, containing the charges above-mentioned, and other Ecclesiastical offences.

The first article stated, that by the Ecclesiastical laws, all ministers in holy orders were required to be decent in their behaviour, to abstain from fornication, &c. under pain of deprivation, suspension, or such other ecclesiastical punishment or censures, as the case may require, and the law authorize, &c. The second article alleged, that Dr. Free was Rector of Sutton. The last article willed, that Dr. Free should be canonically punished according to law, and also be condemned in the costs of the suit, but did not specially point to deprivation.

With respect to the 5th, 7th, 9th, 10th, 11th, and 12th articles, which alleged various acts of fornication, the Plaintiff in Error disputed the jurisdiction of the Ecclesiastical Court.

The Ecclesiastical Court, determined† that it had

\* See the proceedings, argument, and judgment in the Court below, reported 5 Barn. and Cress. 400.

† 2 Addams's Rep. p. 414.

jurisdiction, and gave judgment against the Plaintiff in Error, whereupon he obtained a writ and declared in prohibition. The declaration set forth the libel and the proceedings in the Ecclesiastical Court, and prayed a prohibition. To this declaration a Plea and Demurrer were put in: upon which the Plaintiff joined issue.

The case was argued in Easter term 1826, and on the 6th of May, 1826, judgment was given, which in substance was, that as to so much of the charge as related to the proceeding against the Plaintiff in Error for fornication or incontinence, for the purpose only of his soul's health, and the reformation of his manners, the Defendant in Error should be prohibited from proceeding in the Spiritual Court; but that as to so much of the charge as related to those offences, for the purpose of suspension or deprivation, or other punishment merely clerical, and also as to the other matters charged against him, that the Defendant in Error should not be prohibited from proceeding in the Spiritual Court, but that a consultation should be and it was accordingly awarded in respect thereof; and after argument, the Court of King's Bench was also of opinion that the Plaintiff in Error, was not entitled to costs of suit.

Against this judgment the Plaintiff in Error brought a Writ of Error in Parliament.

For the Plaintiff in Error, *Dr. Addams* and *Mr. Denman*.\*

\* It was proposed with a view to shew the object of the suit to read the citation in the Ecclesiastical Court, to which *Campbell* objected that the citation formed no part of the record. *Dr. Addams* answered that the libel must follow the citation. *The Lord Chancellor* said it did not matter, as the libel described him as Rector of Sutton.

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The charges against the Plaintiff extend from 1810 to 1822, inclusive. The citation is dated in 1824—eighteen months after any act alleged, contrary to 27 Geo. 3. c. 44.

The suit was instituted for his soul's health, and reformation of manners only—that was the sole motive. Deprivation is only one mode of punishment, and that is, for the soul's health, and reformation of manners. The clergy as well as laity, are within the meaning of the act. The refined distinction between clergy and laymen is not warranted by the words or spirit of the act. The act is general, intended to protect the clergy as well as the laity. Indeed the clergy, from their situation, are deserving of greater protection. The suit, though said to be for deprivation or suspension, is essentially *pro salute animæ*, there is no distinction in practice between suits *pro salute animæ* and for deprivation; all suits for deprivation are suits *pro salute animæ*.—For forty years the act has, in practice, been supposed to apply to the clergy as well as the laity.

The judgment of the King's Bench holds, that it does apply to the clergy as well as the laity, to a certain extent. In the Court of Arches it was held not to apply to the clergy at all,—there it was held, that the act passed *alio intuitu*.\* The judgments of the Arches and King's Bench proceed on essentially different grounds.

There is no such thing in the Ecclesiastical Courts as criminal informations. They proceed solely *pro salute animæ*.

The Court of Arches took no distinction between suits for correction, and suits for punishment. The King's Bench did.—This distinction is unwarranted

\* 2 Add. Rep. p. 414.

by principle or practice.—In practice, there is no proceeding for punishment, *quâ* punishment: it is merely *pro salute animæ*.—The punishment is a mean, not the end: the *salus animæ*, and *reformatio morum*, is the end: \* deprivation is a mere mean of correction; † deprivation, is divesting a man of his freehold; the usual consequence of suits of this nature is *suspension* only. The judgment of the King's Bench leaves the Court no option, it must proceed to deprivation.

The title and preamble of the act, is to stay frivolous and vexatious suits, and limits a time: whether the time is too short or too long, is no matter.—The act is express, and this particularly is a frivolous and vexatious suit. There is no charge within eighteen months after the last offence alleged. Surely there should be some limit to proceedings of this nature. \*The charges here begin eighteen or twenty years ago: there is no possibility of rebutting such charges, resting upon evidence possibly suborned and got up for purposes of malice or revenge, &c. There is no conviction of the alleged offences, as it rests in mere allegation. For the purpose of the argument it may be assumed that the plaintiff is innocent of every charge, and he is in fact prepared to deny the facts alleged.

There is an obvious impolicy in allowing such charges to be made without limitation of time. This is the very mischief the act intended to remedy. In fair construction the act applies to clergy as well as laity; there is no exception of the clergy, which of course there would have been, if intended. A general act applies without exception; why not in this case?

\* Gibs. Cod. Corbet's case, 5 Rep.

† Raymond, 1510. Cit. *Townsend v. Thorpe*.

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As to costs,\* the Appellant, by the provisions of the act, (8 and 9 W. 3. c. 11.) is intitled to them, having obtained a prohibition as to the proceeding for fornication.

For the Defendant in Error, *Mr. Campbell* and *Dr. Lushington*.

*Mr. Campbell*.—The judgments of the Court of Arches and the King's Bench are the same. For the sake of the church the Plaintiff should be deprived of his living. The citation is not here, but the libel is, which shews the nature of the proceeding. In the first article, there is no notice of reformation of manners; the object in view of the libel is, that he may be deprived of his benefice. The second article states the induction of the Plaintiff: these articles would be immaterial, unless it were a proceeding against him, as Rector of Sutton. There is no penance required or stated for his soul's health. It is a suit for deprivation founded upon these articles. It is stated, that no proceedings for deprivation ever take place in the Ecclesiastical Court; that is not so,—there is a proceeding for punishment by deprivation.† The direct purpose is to purge the church, which is properly determinable by the Ecclesiastical laws of the realm. Many of the causes of deprivation have nothing to do with *salus animæ* or *reformatio morum*; as for instance: by common law or statute, want of orders,

\* It was objected that the appeal could not be heard on the subject of costs; because it did not form part of the record. The Court of King's Bench had given leave to amend the record below, for that purpose; but this had not been done. It was thereupon intimated by the House, upon the suggestion of *Mr. Courtenay*, that the practice of the House would permit the record still to be amended, and the counsel for the Respondent then waived the objection.

† 2 Burn's Eccl. Law, tit. Deprivation.

simony, plurality, conviction by temporal courts, omission to subscribe the oaths of supremacy, incontinence,\* &c. The causes of deprivation by the Canon law, are wearing arms, non-residence, concubinage,† &c.

This libel is framed to give in evidence the matter of the allegations with the view to deprivation. The 16 Car. 1. c. 11. operated‡ merely to destroy the power of the High Commission Court. The 27 Geo. 8. is the only impediment, does this take away the jurisdiction? if it does not, the common law must have force. Such a result could not have been contemplated by the legislature.

Suppose the case of a bastard child: suppose the fact not discovered till after nine months: this statute of limitation would have run, and the proceeding for deprivation would be barred. It is impossible to contemplate this to have been the intention of the legislature.

The title is part of the act—what is the title, but for restraining frivolous and vexatious suits in the Ecclesiastical Court? the proceedings *pro salute animæ* are a mere mockery,—originally they were not so: in modern times they are. In Scotland the practice of penance still prevails to a certain extent. The suit *pro salute animæ* now, is to make a person pay costs; it may very well have been the object of the legislature to put a stop to such suits. But could it have been the intention to prevent all suits against the

\* In the reign of Eliz., Fox and Burton were deprived for adultery; 6 Rep. 13. 6 Hob. 291. Cro. Eliz. 41.

† This canonical crime appears to have been punished by *degradation*. By 31 H. 8. c. 14. s. 10. a priest keeping a concubine forfeited his goods, chattels, and promotions, and was liable to imprisonment at the king's will.—See the note in Burn's Eccl. Law, tit. q. s.

‡ See the 4th sect., but it is repealed by 13 Car. 2. s. 1. c. 12.

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clergy, for deprivation? The words of the act are general; but they have reference to the title and preamble.

In construing acts of parliament, the court looks to the mischief intended to be remedied;\* if not within the mischief, it cannot be brought within the words. Suits against the clergy for deprivation rarely happen; the cases enumerated in the act frequently; the rare instances are not within the mischief; the offences enumerated, are *defamatory words, brawling in the church, incontinence, &c.* But this is a suit for *deprivation*.† Suits for deprivation are of rare occurrence—suits *pro salute animæ* were in the contemplation of the legislature. If a clergyman marry his prostitute, it would be a cause for deprivation; though a suit for the soul's health could not be maintained. So if a clergyman marry a common prostitute, might he not be sued in respect of his incontinence and scandal anterior to the marriage? There is a distinction between a *clergyman* and a *layman*, as to the jurisdiction in prohibition; as to civil punishment, the prohibition would go, but as to the proceeding for deprivation for such an offence, it would not go.

In the Bishop of Clogher's case the party might have been indicted: but he absconded. No proceedings took place in the Temporal Courts; yet there was a suit for deprivation.

The deprivation is the object of the suit in the case of a clergyman:—with respect to a layman it is different, because there can be no deprivation, but merely correction, *pro salute animæ*. You cannot proceed *pro salute animæ*, even against a clergyman, for an offence cognizable in the Temporal Courts.

\* Com. Dig. Parliament.

† *Sherwin v. Cartwright*, Hutton, p. 111.

Therefore, unless a clergyman happen to be *convicted*, in the Courts of Common Law, there could be no suit in the Ecclesiastical Courts; suppose the clerk, after the offence, absconds, and therefore cannot be convicted, the scandal would remain without remedy.

As to costs, the Plaintiff is not entitled to them. The case is clearly not within the Statute of Gloucester. No costs, therefore, can be given, unless the case is within the 7 and 8 W. and M. The question is, whether the Plaintiff has obtained judgment.

The judgment grants a consultation, as to all the matters. The Plaintiff has no judgment. The Defendant may proceed on the whole, but no judgment can be given on that part, which is *pro salute animæ*. It does not stay the proceedings, but the judgment,

*Dr. Lushington.*—Over the laity the Ecclesiastical Courts have jurisdiction only in *certain cases*, by virtue of *certain canons which have become part of the law of the land*, but these proceedings are *pro salute animæ* only. Over the clergy the jurisdiction is *similar* as to suits *pro salute animæ*; but they have a further jurisdiction in respect of the clerical character. The Court itself was primarily established for taking care that the clergy performed the clerical duties, a jurisdiction totally distinct from that over the laity. If the conduct of a clergyman be wrong, it is the *duty* of the Court to interfere for the purpose of preserving the Ecclesiastical discipline and morality of the church. The judgment in *Middleton v. Croft*,\* is an admirable dissertation upon the subject of this jurisdiction.

The canons are held to bind the *clergy*, though not the *laity*; and the courts have exercised such jurisdiction in all instances. If the clergy are to be ex-

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\* 2 Atk. 607.

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empt from such a jurisdiction, it would have the most injurious effect on the discipline of the church. The proceedings have been generally with a double aspect, namely, that ordinary one, *pro salute animæ*, and the extraordinary one of *deprivation* for offences committed against *the discipline of the church*. If you destroy the jurisdiction in the former, you cannot, we contend, do it in the latter. The very commencement of the articles shews that these criminal proceedings were instituted *for the purpose of securing the discipline of the church*. The Ecclesiastical Court has exercised this jurisdiction from time immemorial. The whole tenor of the proceedings shews that they are not for punishment *pro salute animæ*, but merely for another purpose, *essentially within the province of the Ecclesiastical Court*. In the proceedings in the King's Bench, on the prohibition, it was for the first time contended, that the 27 Geo. 3. destroyed the jurisdiction altogether.

The correction of clerks is frequently excepted out of the patents of charters of dioceses. In Exeter such an exception has prevailed for these two centuries. The bishop has the paramount authority, and from him the jurisdiction is derived. The statute of Hen. 7. gives the bishop an additional power—a power of imprisonment. If this act was repealed by 12 Car., it is still in force, for the 13 Car. 2. s. 1. c. 12. repealed the 16 Car. 1. c. 11. This statute is not noticed in the 27 Geo. 3.

As to the construction of the statute 27 Geo. 3., it is a remedial statute to remove a mischief and advance the remedy: was this a mischief entitled to be remedied by the act? The clergy are not within the mischief of the act. However that be, there is a clear distinction between proceeding *for deprivation* and *pro sal. an.* :

comparatively speaking, the offence of fornication in a layman is much more venial. In a clergyman the consequences from the evil example in a parish, are very pernicious. A suit for deprivation necessarily involves the motives and inducements for suspension and deprivation.

The clergy are not mentioned by name in the 27 Geo. 3. This is observable, for it leaves the statute of Hen. 7. in force to punish by imprisonment, and is supposed to take away the power of proceeding for *deprivation* and *suspension*; this is a *reductio ad absurdum*.

Visitations are held once a year when presentments are or ought to be made by the churchwardens. It may happen then, that the representation on which proceedings are to be instituted, is not known till after the twelve months. Was it meant that the clerk should, in such case, laugh at the discipline of the church? Suppose a man commits adultery, which is not known, but he is afterwards convicted; may not the bishop found any proceedings against the delinquent, on the ground that under the statute the limitation has run out?

The clergy, it is said, require protection. There is no foundation for this argument; for proceedings are scarcely ever instituted against the clergy. There are only fifteen on record in London.

As to costs, if the party succeeds in the *major* part of his demand, he is entitled to costs, not if he succeeds in the *minor* only.

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*The Lord Chancellor.\**—The suit in the bishop of Clogher's case, was *pro salute animæ*, and also for deprivation. There is no doubt of the jurisdiction to inquire into the offence for the purpose of deprivation.

\* In the course of the Argument.

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The question raised by Dr. Addams, is whether you can serve the two proceedings. No authority has been cited, and in the absence of authority, are we to assume that they cannot be severed?

Is deprivation only an incident?—the original libel was in effect *pro salute animæ*, and also for deprivation, the judgment was to prohibit one of the proceedings—if it had not been for that judgment the Ecclesiastical Court might have proceeded to punish, not only by deprivation, but *pro salute animæ*. The Plaintiff has, therefore, obtained a judgment restraining the Ecclesiastical Court. He had a just cause to come for a prohibition, and so the Court adjudged. The costs, therefore, should, according to the act, have been awarded.

I am inclined to think, unless better authority than *Baker v. Roger*\* can be cited, that proceedings for deprivation may be instituted against a clerk, without any suit *pro salute animæ*.

It is not necessary to proceed for judgment, *pro salute animæ*, and deprivation also, *they may be severed*, and judgment may be given to deprive, though no judgment may be given *pro salute animæ*. What is there to shew that deprivation may not be the substantive object of the suit?

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*The Lord Chancellor.*†—The Noble Lord and Reverend Prelate, who have attended the whole of this discussion, are of opinion with me that this act of Parliament does *not apply to a suit, the object of which is deprivation*; and also that the proceedings may be severed. The judgment below must be so far affirmed; with respect to the costs some difficulty occurs.

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*The Lord Chancellor.*—This case arises out of a

\* Cro. Eliz. 789.

† At the end of the Argument.

prosecution in prohibition. The Court of King's Bench gave judgment in prohibition in a particular form, and upon that Doctor Free brought a writ of Error. Certain charges had been preferred against Doctor Free, who was Rector of Sutton, in the county of Bedford; charges of fornication and incontinence of a very precise description, commencing in the year 1810, and continuing down to the year 1822. Those charges were made the foundation of a suit in the Spiritual Court, which suit was instituted in the year 1824, two years, or nearly two years, after the date of the act, which was the subject of the last charge preferred against Doctor Free. Articles were exhibited against him in the Spiritual Court, containing those charges, and it is quite clear in looking at those articles as they are framed, that it would have been competent to the Spiritual Court to have proceeded against Doctor Free to punish him in the ordinary mode for incontinence and fornication, *pro salute animæ et pro reformatione morum*, and also to proceed against him for deprivation either for the one or the other, or both. It is in such a form that the articles are framed, and a corresponding judgment or judgments might have been founded upon those articles.

It was contended in the Spiritual Court by Doctor Free, that the Court could not proceed in that suit, by reason of the 27 Geo. 3. c. 44. By that Act suits for fornication and incontinence must be commenced within eight months from the period when the offence is committed. The Judge in the Court below overruled the objection; in consequence of which a writ of prohibition was issued, and the matter came before the Court of King's Bench. In that Court Doctor Free declared in prohibition, and the main question then raised for consideration, was whether the statute applied to a case of this description. It was admit-

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ted that there was no doubt that the statute applied to an ordinary case of incontinence, or fornication, with a view to the ordinary punishment *pro salute animæ et reformatione morum*. The Court of King's Bench were of opinion, (and I am disposed to concur in that opinion,) that a suit of this description instituted against a Clergyman, as well as against a Layman, must be instituted within the period limited by the statute.

But, another and a much more important question arose as to whether or not that Act of Parliament applied to a suit for deprivation, and I think it is impossible to look at the title of that Act of Parliament, at the preamble of it, at the particular provisions and enactments of it, and to suppose for a moment that they could have been intended to apply to a suit instituted for the purpose of deprivation. It is unnecessary to repeat observations upon these particular parts of the Act of Parliament, because it was considered very much in detail in the argument. I will only say generally that I concur in the view taken by the Judge in the Spiritual Court, that the Act does not apply to a suit for deprivation. I concur in the judgment pronounced in the Court of King's Bench with respect to the distinction that the Act of Parliament does not apply to a suit instituted for the purpose of deprivation.

If that be so, let us consider the question of form according to the state of proceedings in the Ecclesiastical Court. I have already stated, that according to my opinion the Court might have proceeded to punish the individual in the ordinary way, *pro salute animæ et pro reformatione morum*, and it might also have proceeded to deprive him, or it might have proceeded for the one or the other, or both. The Court

of King's Bench were of opinion that with reference to the mode of proceeding with a view only to the reformation of the manners, with a view only to punishment *pro salute animæ*, the statute was a bar. They pronounced that judgment distinctly, drawing the attention of those persons who heard the judgment to that distinction; and they, in their judgment, therefore, allowed the party to proceed below, for the purpose of deprivation, and for the purpose of deprivation only. They said there are two objects for which this suit is instituted, or the judgment may be directed to two purposes, those purposes which I stated. As to one, the Court cannot proceed, because it is out of time. With respect to the other, we are of opinion that the statute does not apply, and therefore the Court below may proceed for that particular object.

The Court of King's Bench was warranted in so severing that judgment, not merely upon principle, but on reference to the cases which were quoted. It appears to me that in principle the case of *Slater v. Smallbrooke*,\* was directly in point, that was a proceeding against a party who had obtained forged orders, and was instituted to a benefice. A prohibition was obtained, and the case came before the Court of King's Bench, and the Court of King's Bench held that the Spiritual Court had no jurisdiction to enquire into the forgery of orders, with a view of punishing for such forgery, that is to say, as a temporal offence, but that they might enquire into that offence for the purpose of deprivation, and of deprivation only. The Court below, therefore, was allowed to proceed

\* 1 Lev. 138. 1 Sid. 217. The prohibition was refused, because the forgery was touching an Ecclesiastical matter, and the proceeding with a view to deprivation *quia mere Laicus*. See S. C. but not S. P. 1 Kel. 731.

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and to enquire into the particular offence of forgery, not with a view to punish for that forgery in the ordinary way, in which the Ecclesiastical Court punishes for that offence, but for the purpose of deprivation; and according to the report of the case for deprivation only. That case applies strictly to the present. By the operation of the statute 27 Geo. 3. the Court below, the Spiritual Court, cannot proceed to enquire into the incontinence and fornication of Doctor Free, with a view to punish him in the ordinary mode, *pro salute animæ et reformatione morum*, but they may, according to the construction which the Court of King's Bench has put upon the Act, proceed to enquire into the incontinence and fornication, for the purpose of deprivation, and deprivation only. I conceive, therefore, that the case of *Slater v. Smallbrooke* is precisely in principle the same as this case.

In the case of *Townsend v. Thorpe*,\* the Judgment pronounced after much consideration by the Court of King's Bench, is precisely to the same effect. That was a suit instituted against a parish clerk for the purpose of deprivation. He was charged with various offences of an indecent nature, which it is not necessary to particularize. A writ of prohibition was issued out, and the party declared in prohibition. The Court held that a Spiritual Court has no jurisdiction whatever, to enquire into those offences for the purpose of punishing those offences civilly; but that the Court may enquire into those offences for the purpose of deprivation; and that was the judgment pronounced by the Court, severing the two parts of the charge and allowing an enquiry for the purpose of deprivation; and the judgment of the Court passed accord-

\* 2 Lord Raym. 507. 2 Stra. 776. *sed vide* 942.

ingly. Now that also is a case precisely similar to the present, and it is not only similar in principle, but it confirms the judgment of the Court of King's Bench, because the judgment is substantially that, with a view to deprivation only, (whatever forms it may be necessary for the Ecclesiastical Court to adopt,) with that view only the Court below may proceed. If the object of the Court below is to proceed, for the purpose of punishing for incontinence, *pro salute animæ et reformatione morum*, in that case the statute applies: but the Court of King's Bench says we will allow the parties to proceed in the Court below, for the purpose of deprivation only, with all those forms and those ceremonies, and that manner of proceeding, which is necessary for the purpose of carrying on a suit for deprivation. If, therefore, you are satisfied that the construction put upon this Act of Parliament by the Court of King's Bench, is the correct construction, about which you will probably entertain no doubt, the judgment up to this point should be affirmed.

The only question which remains for consideration is the question of costs, and I confess I at first entertained considerable doubts upon that point. The party who succeeds on Demurrer in prohibition, was not entitled to his costs, previously to the Act of 8th and 9th William 3. Unless therefore it is clear from the Act of 8th and 9th William 3. that he is entitled to his costs, they cannot be given. Now that Act says that if the Plaintiff on Demurrer obtains judgment, he shall be entitled to his costs. What is the case in the present instance? A prohibition is applied for, to restrain the Spiritual Court from proceeding upon certain articles. The judgment of the Court of King's Bench was, that upon those articles the

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party should proceed, but with this species of exception that they should proceed in a qualified way, and for a particular object. That is a judgment at least as much for the Defendant as for the Plaintiff. How can that be said to be a judgment for the Plaintiff in prohibition, more than it is a judgment for the Defendant? If that be so it cannot be said that the Plaintiff has obtained judgment upon his Demurrer,—it is a judgment for the Defendant in Demurrer, qualified in the manner I have stated. The Court of King's Bench, considering this as a case not within the statute, a *casus omissus*, held that the Defendant was not entitled to his costs in that Court. If it is a *casus omissus*—if that is the right construction of the Act of Parliament—it must follow that it was not the intention of the legislature under such circumstances, that the Plaintiff in Demurrer should be entitled to his costs. I should, therefore, recommend to your Lordships, that the judgment of the Court of King's Bench should be affirmed; and I think, under all the circumstances of this case, that the judgment should be affirmed with costs.

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Judgment affirmed, with 100*l.* costs.

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(ENGLAND.)

(COURT OF EXCHEQUER.)

THOMAS LEWIS and ROBERT ANDREW } *Appellants.*  
STEVENS - - - - -

HENRY ALLNUTT - - - - - *Respondent.*

A., the owner of the tithes of a district in a parish, and B., his lessee, in July, 1824, file a Bill in Chancery against C., the occupier of lands within the district, praying an account for six years back of the tithes of clover, vetches, meadow and rye grass, and other grasses, cut green, and partly left in the swathe, and partly cocked: C. by his answer, admits the title of A. and B. to the tithes of the district, and his own occupation, and the taking of the tithes; but contends that the clover, &c., are small tithes, and belong to, and are claimed by the vicar, and that he pays to the vicar a composition for all the small tithes, and that the clover, &c. had been used as green meat for his husbandry horses; and upon these grounds he denies the title of the Plaintiffs to the tithes in question.

It appeared in evidence, that in the year 1822, C. had written a letter to B. stating, that on the day of writing the letter, he should cut vetches, and set out the tithe, and that he had no objection to compound; and in the year 1824 a letter having been written by the Solicitor of A., threatening to file a bill for the tithes in question; C., by his answer to that letter, says, that he has never refused to pay the lessee the tithes of green clover, vetches, and grass.

Upon these admissions, notwithstanding the objections raised by the answer, held (reversing the decree of the Court below,) that the Plaintiffs were intitled to a decree for an account.

Whether the natural or artificial grasses, cut green and lying in the swathe, or set up in cocks, are great or small tithes, and whether if given to husbandry horses, there being other food grown on the farm sufficient for these horses, they are exempt from tithe. *Quære.*

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IN this Cause a Bill in Chancery was filed by the Appellants as owner and lessee, of the tithes of a district or portion of land within the parish of Cookham, in Berkshire; called by the name of the Lower Division, stating their respective titles, and that the Respondent had, in the years 1819, 1820, 1821, 1822, 1823, and 1824, occupied a certain farm or portion of arable, meadow, and pasture land, lying within the parish of Cookham, or the titheable places thereof; and that the Respondent had, in each of the years, 1819, 1820, 1821, 1822, 1823, and 1824, cut and taken from off his said lands, situate within the boundaries aforesaid, large quantities of clover and vetches, meadow and rye grass, and other grasses which he had from time to time carried off whilst green, and without making the same into hay, part thereof in the swathe, the other part thereof in heaps or cocks; and the Appellant submitted that the tithes of all such clover, vetches, grasses, and tares, so cut and taken away by the Respondent, ought to have been set out by the Respondent to the Appellant R. A. Stevens as lessee, or a full compensation for the same ought to have been paid to the Appellant; but that the Respondent had taken the tithes of all the titheable matters and things aforesaid, and converted the same to his own use, without setting out the same to the Appellant R. A. Stevens as lessee, and without making to the Appellant any allowance or satisfaction for the same.

By the amended bill the Appellants charged that if, as the Respondent pretended he had given any part of such clover, vetches, grasses, and tares to husbandry horses, he had at the time upon his farm and lands sufficient provender or food, or in case he had not sold or disposed of the same, he might

have had upon his farm sufficient provender or food fit for the sustenance of such husbandry horses, without having recourse to such clover, vetches, tares, and grasses, so carried away green. The Appellants further charged that the tithes of such clover, vetches, grasses, and tares, in fact belonged to and ought to have been set out by the Respondent to the Appellant R. A. Stevens : and, after suggesting that the Respondent at times pretended, though contrary to the fact, that he had accounted for such tithes to the vicar of the parish, the Appellants charged that the Respondent had admitted the Appellant's title to the tithes of green clover, vetches, and grass grown upon the lands in the Respondent's holding during the several years respectively before mentioned ; and particularly that the Respondent in the years 1822 and 1824 admitted that the Appellant R. A. Stevens was entitled to the tithes of the green clover, vetches, and grass grown upon the lands in his the Respondent's holding. The amended bill prayed, that the Respondent might be compelled by the decree of the Court to come to a fair and just account with the Appellant R. A. Stevens for the single value of the tithes of all the clover, vetches, tares, and grasses which he in manner aforesaid had and took upon and from off his farm and lands in each and every of the years 1819, 1820, 1821, 1822, 1823, and 1824, and that the Respondent might be decreed to pay the Appellant R. A. Stevens what should appear to be coming to the Appellant on the taking of the account, and for general relief.

The Respondent, by his answer to the original bill, stated, that he believed it to be true that the Appellant Lewis was, in and prior to the time in the bill mentioned, and had ever since continued to be seized

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of or well entitled to the tithes of corn, grain, hay, and all other the great tithes, yearly arising, renewing, and increasing, within such district or portion of land as in the bill mentioned; and that such district or portion of land was known by the name of the Lower Division of the parish of Cookham, and that such indenture of demise was made by and between such parties, and to such purport and effect as set forth in the bill: and that, under such indenture of demise, the Appellant R. A. Stevens became entitled to the tithe of corn, grain, and all other the great tithes, yearly arising, growing, renewing, and increasing upon all the lands situate within such part of the parish of Cookham, or the titheable parts thereof, as was or were comprised within the limits, bounds, and precincts described in the bill.

He thereby also admitted the occupation of lands within the district, and the perception of the clover, &c., from the lands, for the several years and in the manner stated in the bill. But he denied that the tithe of all such clover, vetches, grass, and tares, so cut and taken away by him in a green state, ought to have been set out to the Appellant R. A. Stevens: or that any compensation in respect of the same ought to have been paid to the said Appellant in respect thereof; and he submitted that all such clover, vetches, grass, and tares, whilst in a green state, if titheable at all, was titheable as a vicarial or small tithe, and of right belonging to the vicar for the time being of the parish of Cookham; and that the Appellant R. A. Stevens, as lessee under the Appellant Thomas Lewis, who was the lay impropriator of the rectorial or great tithe, was not entitled to the same.

The Respondent admitted, that he had, by reason of such clover, vetches, tares, and grass, being (if liable

to any tithe,) titheable to the vicar for the time being, to whom the Respondent paid the annual sum of 18*l*. as a composition in lieu of his vicarial or small tithe, cut and carried away divers quantities of such clover, vetches, tares, and grass, whilst in a green state, without setting out the same to the Appellant R. A. Stevens, as such lessee, except as thereafter excepted, and had converted the same to his own use, and without making to the Appellant any allowance or satisfaction in respect thereof.

The Respondent denied that the Appellants, or either of them, ever made such applications and requests to him as mentioned in the bill, or that he had refused to comply therewith; but he said that in or about the spring of the year 1823, having been informed that the Appellant R. A. Stevens intended to claim the aforesaid tithe of green meat, he the Respondent, in order to avoid litigation, set out the same, and having apprized the Appellant R. A. Stevens thereof, requested him to take the same away; and that thereupon the Appellant R. A. Stevens replied in the words, or to the effect following, that is to say, "You had better take it up, I don't want any thing more than my right, it will be determined now whether I have any right to it or not, as Sir Samuel Young's Cause\* will soon be settled;" and that the Respondent by such answer understood that the Appellant R. A. Stevens agreed that his claim

\* This was a suit for tithes in the Exchequer, raising the same question—in substance as in this appeal. The decree in the Exchequer was against the tithe-owner, and for the occupier. From which decree an appeal was pending, and would have been heard at the same time with this appeal; but just before the time appointed for hearing, the Respondent died. The cause still remains abated. The report of the case in the Court below, is to be found in 13 Price's Rep. 394. *Lewis v. Young*, Bait.

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in respect of the tithe of clover, vetches, grass, and tares, should be determined by the decision of the Court of Exchequer in the suit then pending between the Appellants and the said Sir S. Young, Bart. And that the Respondent had, in consequence of such understanding, cut and carried away, and had since continued to cut and carry away divers quantities of the clover, vetches, grass, and tares, whilst in a green state, without setting out any tithe in respect thereof to the Appellant R. A. Stevens.

The Respondent admitted that he had given to his husbandry horses divers quantities of such clover, vetches, grass, and tares, whilst in a green state ; and that so much of the residue thereof which was not converted into hay was consumed by his cows. And he said that if the Court should be of opinion that he ought to set forth an account in respect thereof he, for the reasons thereafter-mentioned, was unable so to do, except that in the year 1824 the principal part of the Respondent's hay having, owing to the rains, been spoilt and so badly got up as to be fit only for litter and feed for cows, the clover, vetches, grass, and tares, were in consequence wholly consumed by his husbandry horses ; and that in respect of the years 1819, 1820, 1821, 1822, and 1823, in which he had succeeded in getting in his hay in good condition, after allowing the usual proportion of green meat for his husbandry horses, the quantity of clover, vetches, grass, and tares consumed on his farm and lands in a green state had not been more than sufficient for their sustenance ; and that the residue thereof had been converted into hay, the tithe whereof had been duly set out to the Appellant R. A. Stevens, or a full compensation paid to him in lieu thereof.

He said, that for the reasons in his answer men-

tioned he was unable to set forth what was the value of the clover, vetches, grass, and tares, or the state thereof respectively when the same were so cut and carried away as aforesaid, or how much thereof respectively was taken whilst the same was in heaps or cocks ; nor could he set forth a full, true, and particular account of all the said clover, vetches, grass, and tares so cut and carried from off his said farm and lands in each or any of the years 1819, 1820, 1821, 1822, 1823, and 1824, save as aforesaid, or of the value thereof in each or any of the said years, or of the value of the tithe thereof.

By his answer to the amended bill the Respondent denied that he ever admitted the Appellant's title to the tithes of green clover, vetches, and grass upon the lands in the Respondent's holding, during the several years mentioned in the amended bill, or particularly in the years 1822 and 1824 ; but he said that in the year 1824, for the reasons set forth in his former answer, he set out the tithes of the green clover, vetches, and grass, and invited the Appellant R. A. Stevens to take the same away ; but, the Respondent, at the time of his so setting out the said tithes, expressly protested against the Appellant's title thereto : and that thereupon the Appellant R. A. Stevens declined to take possession thereof.

The Appellants replied to the answers, and the Respondent rejoined : whereupon the cause being at issue, evidence was entered into by the Appellants, but no evidence was given by the Respondent either to prove the title of the vicar to the tithes in question, or to support any other of the allegations contained in his answers.

The cause was heard before the Vice Chancellor, on the 10th of February, 1827, when, on the

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tiff must then apply to the court from which the case came, for a decree for an account.

We only give judgment, under the special circumstances which appear upon the evidence in the cause, and particularly on the admission of the Defendant himself. As to the particular form, in which the judgment should be drawn up, we will consider further before we pronounce it.—This decides nothing with respect to the general question, as between the Rector and other parties, in this Parish; but on the particular evidence, and the admissions in the cause, the Appellants are entitled to a decree.

We decide this, upon the evidence—I do not find any thing to explain that letter, to which I have adverted.


I see there is another letter written on the 23d of June, 1824, in consequence of an application from Messrs. Freame and Best, in which he says, “Never having refused to pay Mr. Stevens for the tithe of green clover, vetches, and grass, grown upon the lands, upon my holding within Mr. Lewis’s tithing, it is unnecessary for me to do more than acknowledge the receipt of your letter of the 21st instant.” He does not anywhere deny the right of the rector, and he admits the right in that other letter. He never thinks of denying the right till he comes to his answer.

It is said that the tithe belongs to the vicar, but there is no evidence to establish the right of the vicar. It is possible that the right may be in the vicar; but then it must be established by proof. It is to be taken, nothing being shewn to the contrary, to be in the rector, and in this case there is no evidence to disprove the right in him.

24th June, 1828.

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Ordered and adjudged, that, upon considering the particular evidence and admissions in this cause, the decree be reversed, and it is hereby declared, that the Appellants are entitled to have and receive, from the Respondent, the single value of the tithes of all the clover, vetches, tares, and grasses had and taken by him from off his farm and lands, in each and every or any of the years 1819, 1820, &c. or demanded by the Appellant's bill, in the cause, and that the Respondent ought to pay to the Appellant R. A. Stevens, what should be found due upon such account, together with the costs of the cause; and it is also declared, that the Appellants are entitled to be repaid such costs as they have paid to the Respondent in pursuance of the decree of dismissal.— And it is further ordered, that it be referred to the Court of, &c., to give directions to carry the judgment into execution.

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## ENGLAND.

(COURT OF EXCHEQUER.)

The Reverend HENEAGE ELSLEY, }  
Clerk, and HENRY BARTON - } *Appellants.*

The Reverend WATSON STOTE }  
DONNISON, Clerk - - - } *Respondent.*

Upon a bill for tithes by a vicar against the occupiers of an estate which had belonged to the Knights Hospitallers of St. John of Jerusalem; and, after the dissolution of the monasteries, being vested in King Henry the Eighth, had been granted by him to the Archbishop of York and his successors, under whom the Defendants occupied; the Defendants pleaded that the lands were held by the Hospital exempt from tithes—that they were so held and granted by the king; and they proved that no tithes had within memory been paid for the lands. On the part of the vicar was produced an *inspeximus* of an inquisition made under the authority of the Archbishop of York in 1314; by which it was found, after specifying certain tithes, “that the vicar ought to receive *all other tithes* to the said church belonging, (except corn and hay,) which the master and brethren of the hospital of St. John of Jerusalem received as rectors: but that all the vicars had, ever since the time of the ordination of the vicarage, received all other tithes, and peaceably, and did so at that time, but they were bound to give their tithe of corn and hay.”

Held, upon the evidence of this document, that the vicar was entitled to the tithes claimed by his bill.

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THE Respondent, in Hilary term 1819, exhibited his bill of complaint in the Court of Exchequer, against the Appellants, stating, among other things, that he

was, in 1784, presented, instituted, and inducted into the vicarage and parish church of Feliskirk in the county of York; and as such vicar, by some ancient endowment, or by prescription or immemorial usage, had ever since been, and then was entitled to receive all the tithes yearly arising in the parish, or the titheable places thereof, except the tithes of corn, hay, and wood; and further stating that the Appellant Heneage Elsley was the owner of a mansion house and hereditaments situate within the parish thereof, called Mount St. John, which in and since the year 1792, the Appellant Heneage Elsley had demised to the persons therein named, (and amongst others the Appellant Henry Barton,) or the same had been occupied by the Appellant Heneage Elsley himself; and further stating that in and since 1792, such successive occupiers thereof had had divers titheable matters and things (besides corn, hay, and wood,) upon the premises called Mount St. John, the tithes of which ought to have been set out for the Respondent as vicar, but that the same had been subtracted from him; and praying that an account might be taken under the decree of the Court, of the tithes of the several titheable matters and things had and taken by the persons therein named, and by the Appellants, Heneage Elsley and Henry Barton, respectively, in and from the year 1792; and that the Appellants might be decreed to answer and satisfy what should be coming due to him from them respectively, upon the taking of such account.

The Appellants appeared and put in their answer to the bill, and thereby stated, amongst other things, that they did not believe that the Respondent was entitled, by the means in the bill mentioned or other-

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wise, to any tithes yearly arising upon the estate or district of land in question; they thereby farther stated that there was a certain estate or district of land situate within the parish of Feliskirk, called or known by the name of Mount St. John, or the Mount Ring, which consisted of a mansion house, and the several parcels of land particularly specified in the Appellants' answer, and of which the mansion house and hereditaments mentioned in the Respondent's bill were parcel; that the said estate or district of land was formerly parcel of the possessions of the late hospital of St. John of Jerusalem, in England, which was dissolved, and the possessions whereof were given to the crown by stat. 32 H. 8. c. 24. intituled "An Act concerning the possessions of St. John of Jerusalem, in England and Ireland."

They contended that the said estate or district of land was by composition, prescription, or some other lawful ways and means, held and enjoyed by the prior and brethren of the hospital at the time of the dissolution thereof, discharged, as well in the hands of themselves as of their lessees or tenants, from the payment of all tithes, as well great as small; that the said estate or district of land came to the crown discharged from the payment of tithes by virtue of the stat. 32 H. 8. c. 24. and of another statute passed in the 31 H. 8. c. 13. intituled "An Act for dissolution of monasteries and abbeys," or one of them; that after the said estate or district of land came to the crown, the same was granted by King Henry the Eighth, in the thirty-fourth year of his reign, to Edward, then Archbishop of York, and his successors; and that the same had ever since belonged to the Archbishops of York for the time being, and had, by virtue of the said statutes, or one of them,

been holden and enjoyed by the said Archbishops, their lessees and tenants, discharged from the payment of all tithes, as well great as small; that no tithes arising upon the said estate or district of land, nor any satisfaction in lieu of such tithes, had ever been paid to or received by any person or persons whomsoever, since the dissolution of the hospital, except the tithes recovered by the Respondent in the late suit\* mentioned in the Appellants' answer, and the tithes of parts of the estate or district of land, which since the decree in such suit, which was made in the year 1815, had been rendered to the Respondent, but to which the Appellants believed and insisted the Respondent was not of right entitled.

They further stated by their answer that the Appellant Heneage Elsley had, ever since the year 1792, holden, and then held the estate or district of land as lessee under the Archbishop of York; and contended that the Respondent was not entitled to the tithes claimed by his bill, and they insisted that such tithes ought not to have been set out for him.

The Appellants afterwards put in a further answer relating to certain allotments under an inclosure act, and claiming the same exemption as to the lands allotted.

The Respondent having replied, and the cause being at issue, the Appellants proved the grant by Henry the Eighth, of the lands composing the district of Mount St. John, their identity, and the non-payment of tithe.

\* There had been a suit in the Exchequer by the vicar against other occupiers of Mount St. John; the Defendants in that case set up a title to the tithes. In 1816, Thompson, C. B., pronounced a decree for the Plaintiffs, being of opinion that no title to the tithes had been made out, but observing that the ground of exemption not having been taken, it was unnecessary to consider the validity of such a ground of defence

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On the part of the Respondent as evidence of the endowment of the vicarage of Feliskirk, it was proved by the *inspeximus* of an inquisition registered among the records in the Archbishop of York's registry, and produced by the deputy registrar of the Archbishop of York, that in the year 1314, the then Archbishop of York issued his mandate, directed to Andrew de Grymstone, then sequestrator in the Archdeaconry of Cleveland, commanding him upon the receipt thereof, without loss of time, to go to the church of St. Felix, and there by trusty men of that parish, with scrupulous diligence to inquire in what portions or profits the vicarage of the said church did then consist, and in possession of what profits William de Grymstone the last vicar thereof, was whilst he lived; and in the possession of what profits the other vicars, his predecessors, were since the time of the ordination of the said vicarage, and how much the profits to the said vicarage appertaining, were worth one year with another, according to the true value of the same, with directions to certify thereupon distinctly and openly before the octaves of St. Martin; that the sequestrator, by virtue of his mandate, went personally to the church of St. Felix, and by trusty and wise men of that parish, made due and diligent inquisition upon the premises; by which he found, amongst other things, that the vicar of the church of St. Felix ought to receive the tithe of wool and lambs of the whole parish, and that it was worth, one year with another, 100*s.*; the lent tithes, and the three oblations in the year were worth, one year with another, five marks; the white tithe was worth, *per annum*, 16*s.*; the tithe of hens, ducks, and pigs, was worth, *per annum*, 20*s.*; the tithe of hemp, flax, and gardens was worth, *per annum*, 20*s.*; the tithe of calves, pullets, and bees, was worth, *per an-*

*num*, 6s.: and that it was to be known that the vicar ought to receive *all other tithes* to the said church in any wise belonging, excepting only the tithe of corn, and the tithe of hay, which the master and brethren of the hospital of St. John of Jerusalem received as rectors; but that all the vicars had, ever since the time of the ordination of the vicarage, received all other tithes peaceably, and did so at that time, but they were bound to give their tithe of corn and hay.

It was also proved on the part of the Respondent, by the production of the minister's account, in the 32d year of the reign of Henry 8, that at that time the master and brethren of the hospital of St. John of Jerusalem were only entitled to the tithes of corn and hay of the parish of Feliskirk; and by the production of the grant of the 36th year of the reign of Henry 8, it was proved, that the tithes of corn and hay of the parish of Feliskirk only were granted to the then Archbishop of York and his successors; and by an indenture of lease, dated the 31st day of October, 1758, being a lease of Mount St. John, and other lands, from the Archbishop of York to the ancestors of the Appellants, it was shewn that the small tithes of the district of Mount St. John were not granted to them.

The cause was heard before the Lord Chief Baron, on the 1st and 18th days of May, 1824.

On the 11th of November, 1824, the Chief Baron delivered the judgment of the Court, by which it was referred to one of the masters of the Court to take an account of the tithes of the several matters and things (except corn and hay) had and taken by the Appellants respectively, from and upon the lands and grounds called Mount St. John, or the Mount Ring, in the parish of Feliskirk, in their respective occupa-

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tions, six years prior to the filing of the Respondent's bill : and it was further ordered and decreed by the Court, that what should be so found due from the Appellants respectively, upon the taking of such account, should be answered and paid by them respectively to the Respondent : and it was further ordered by the Court, that it should be, and it was thereby referred to the master to tax the Respondent his costs of the suit, so far as regarded the said Respondent's demand of the tithes, of which an account was thereinbefore decreed as aforesaid from the said Appellants ; and that such costs, when taxed, should be paid by the Appellants to the Respondent, or his solicitor or clerk in Court : and it was also ordered and decreed by the Court, that the Respondent's bill, so far as it sought any account or demand of tithes, other than and beyond the tithes of which an account was thereinbefore decreed, should be, and the same was thereby dismissed out of Court, with costs to be taxed for the Appellants by the master, to whom it was thereby referred to tax the same : and it was further ordered, that such last-mentioned costs, when taxed, should be paid by the Respondent to the Appellant Heneage Elsley, or to his solicitor or clerk in Court.

The Appellants, considering themselves aggrieved, appealed against so much of this decree as ordered, adjudged, and decreed that it should be referred to the master to take an account of the tithes of the several matters and things (except corn and hay) had and taken by the Appellants respectively, from and upon the lands and grounds called Mount St. John, or the Mount Ring, in the parish of Feliskirk, in their respective occupations, six years prior to the filing of the Respondent's bill : and by which it was ordered and decreed that what should be so found due from

the Appellants respectively, upon the taking of such account, should be answered and paid by them respectively to the Respondent; and by which it was ordered, that it should be, and it was referred to the master to tax the Respondent his costs of this suit, so far as regarded the Respondent's demand of the tithes, of which an account was thereinbefore decreed as aforesaid from the Appellants; and that such costs, when taxed, should be paid by the Appellants to the Respondent, or to his solicitor or clerk in Court.

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For the Appellants—*Mr. Boteler* and *Mr. Bick-ersteth*.

There was no evidence in the cause on the part of the Respondent, that he, as vicar of the parish of Feliskirk, was entitled to take any tithes whatsoever, arising upon the estate or district of land called Mount St. John.

Arg. 23d and  
 26th March,  
 1827.

The defence is, that the lands of Mount St. John were held by the hospital tithe-free.

The absolute exemption or discharge from the payment of all tithes, as well great as small, arising upon that estate or district of land, insisted upon by the Appellants in their answers to the Respondent's bill, was fully proved by the evidence adduced in the cause.

The inquisition produced by the Respondent at the hearing of the cause, for the purpose of proving his right as vicar of the parish of Feliskirk, to all the tithes, except the tithes of corn, hay, and wood, of the district of Mount St. John, and of disproving the exemption or discharge from the payment of tithes for that district, insisted upon by the Appellants, could have no such effect: first, because the same was taken in the absence of the prior and brethren of the

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hospital of St. John of Jerusalem, and of their lessees or tenants : and secondly, because the general terms in which this instrument speaks of the right of the vicar of the said parish to tithes, do not prove his right to the tithes of any particular estate or district of land in the parish from which the vicar has never received any tithes ; nor are they in any way inconsistent with the fact of any particular estate or district of land in the parish being exempt or discharged from the payment of tithes.\*

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For the Respondents—*Mr. Pepys* and *Mr. Koe*.

The defence in the former suit was, a title to the tithes by grant. In this suit they claim by prescriptive exemption. The two defences are inconsistent. It might be a question whether these lands are capable, under the 31st Hen. 8. c. 13. of being discharged from tithes. A hospital was not privileged as a monastery. The exemption was supposed formerly, not to be attached to the lands, but to be personal to the ecclesiastical bodies. The exemption stands on the 21st sect. of 31 Hen. 8. c. 13. But the order of St. John of Jerusalem was dissolved by 32 Hen. 8. c. 24. In this act there is no such provision as in the 21st sect. of 31 Hen. 8. c. 13. It has been held, in similar cases, that such bodies were not exempt. *Cornwallis v. Spurling*.† Later cases have taken a different view.

According to the modern rule of prescription, there must be immemorial possession to the time of the dissolution, by a body capable of discharge, and subsequent non-payment. In this case the possession is short of the time of legal memory. Proof of payment

\* *Carr v. Henton*, 1 Anst. 313. n. 7 B. P. C. 100.

† Cro. Jac. p. 57. Archb. of Cant. case, 2 Co. 46. *Urrey v. Bowyer*, 1 Gwill. 250. *Whitton v. Weston*, Latch. 89. Wi. Ent. 342. Godb. 392. W. Jo. 182. N. Bendl. 168, 185.

of tithes, or acquisition of the lands since the time of Ric. 1, destroys the ground of prescription.

The defence is still in substance, not exemption, but a claim by title, arising from the circumstance of the rectory and the lands being in the same hands. The hearsay of persons lately living is not to be put in competition with the evidence of such a document as the inquisition.

To send the question to an issue would be useless; because it arises upon the construction of an instrument, which it is the province of the Court to construe.

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*The Earl of Eldon.*—The question which your Lordships have to determine is, whether the owners of a certain part of the parish of Feliskirk, in the county of York, have a right to insist that they are exempted from the payment of small tithes to the vicar. 8th July, 1828.

It appears that there was a former suit in the Court of Exchequer, on a bill filed in the year 1807.—That was a suit relating to these small tithes, in which the owners and occupiers of part of the parish of Feliskirk insisted that they were themselves entitled, as claiming under a sort of Collegiate Institution, called the Hospital of Saint John of Jerusalem, to the small tithes of this district. An instrument was produced from the archives of the Archbishop of York, which, it was insisted, proved that the vicar was entitled to receive many of the small tithes of that parish; and no doubt he was entitled to receive all the small tithes of this parish, unless it could be shewn that they were in somebody else. The suit to which I have first referred, was decided by a learned Judge of very great experience, —I mean the late Lord Chief Baron Thompson, and no man can name him, without stating

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that few persons who have ever presided in that Court, possessed more ability and research, or were more fitted for the decision of such a question.—Upon the production of the instrument, from the archives of the Archbishop of York, he was decidedly of opinion, and in that the Court agreed with him, that that instrument proved that the vicar was entitled to the small tithes of this district of the parish, as well as those of the rest of the parish; but that at any rate it proved, that the title to enjoy the tithes by the owners of that district, themselves claiming under a grant to the hospital of Saint John of Jerusalem, was negatived by that instrument; and, therefore, that if they had any defence against the vicar, it must be a defence set up on another ground.—That produced the present suit.

In the present suit, the Appellants contend, that they have a right to prescribe *non decimando*, as claiming under a dissolved monastery. Whether that monastery was dissolved by the statute of the 31st Henry 8, or the 32nd Henry 8, does not appear from the papers; but your Lordships will recollect, a considerable doubt has been raised, as to one of those statutes, whether it operates beneficially to those who claim the lands belonging to the monastery, or whether the claim is valid on behalf of laymen.

The right of the vicar depends entirely upon the same instrument, and that instrument, it has been contended at the bar, proves that there can be no such thing as a prescription *non decimando*; because it proves that the vicar himself was entitled to those tithes, though it may appear, that in modern times he has not taken these tithes. The Court of Exchequer has judicially asserted that the instrument proved that there was no positive title to the tithes in those who represented the monastery; that the vicar is entitled to the tithes,

and not the person who possessed that instrument ; and it is impossible, in my opinion, to decide that that judgment is wrong. It is a mere question upon the construction of that instrument. It is, therefore, a question which necessarily is not sent to a jury ; because the construction of an instrument belongs more to the Court than to the jury, who may certainly infer what they think proper from the payment or non-payment of tithe : but if that instrument proves that which Lord Chief Baron Thompson thought it did prove, it is impossible that the case of the Appellants can be supported by it.

When this cause came under the consideration of the Court of Exchequer, in the second instance, they were of opinion that the construction put on that instrument, by Lord Chief Baron Thompson, was the proper construction, and that the vicar was entitled to these tithes.—It is very difficult, perhaps, for any one to say that any instrument of this kind will not bear a good deal of criticism, which may give rise to some degree of doubt ; but looking to the opinion of the several learned Judges well versed in the construction of instruments of this nature, who have concurred in their opinion with respect to the legal bearing of this instrument, I certainly cannot advise your Lordships to consider both those judgments as erroneous.—If the first was not wrong, (and from that decree there was no appeal,) the second was not wrong ; I am of opinion that they were both right, and that you ought to affirm this decree. I therefore move that this decree be affirmed—I would not propose to give any costs.

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Judgment affirmed, without costs.

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## IRELAND.

(COURT OF CHANCERY.)

MICHAEL COLLINS - - - - - *Appellant.*The Reverend CHARLES HARE - - *Respondent.*

A., an army agent in Dublin, having effected a policy of insurance on his own life for 3,000*l.*, in 1819, by an informal instrument, attested by two witnesses, assigned the policy to C., who had been for many years his confidential clerk. From the time of the assignment A. paid two-thirds, and C. one-third of the premium. In 1821, by a more formal instrument, drawn up by a professional person, he executed a further assignment of the policy. In the first instrument, the consideration expressed for the assignment is, "*regard and affection*;" in the second, "*friendship and affection*." The last assignment was drawn up by the Attorney of C., and both the instruments were drawn up and executed, without the knowledge of A.'s family.

By a codicil to his will, A. gave to C. a legacy of 100*l.*, as a further mark of his regard and affection. Upon the death of A., a letter addressed to his son was found enclosed in his will, stating that the assignment had been extorted from him by C., by threats and undue influence.

Upon a bill filed by H., as executor of A., to set aside the assignment on the ground of fraud, and undue influence, C. by his answer claimed the interest under the assignment, as a compensation given to him by A., in the place of an increase of salary. Upon the depositions it appeared in evidence that C. had given different accounts of the object of the policy, viz. that it was effected as a provision for the wife of A., and that it had been given to him, for making up the accounts of A., in a way to deceive government.

It appeared also in proof of the charge of influence, that C. had declared when the codicil was in contemplation, that none should be executed unless he chose; and when the letter was found in the will, that he said he could ruin the credit of the house and the character of the testator. Upon this, and other

evidence, an issue was directed at the instance of the Defendant, to try whether the assignments as to two thirds of the sum insured, were the free and voluntary acts of the testator, or extorted from him by threats or undue influence, or obtained by fraud: the Defendant, upon the trial of this issue was to produce the deeds of assignment, and the attesting witnesses.

Upon the trial of the issue, the letter found enclosed in the will was tendered in evidence by the Plaintiff; but rejected. The deeds of assignment and the attesting witnesses were produced by the Defendant; but the Plaintiff declined proving them, and the witnesses were not examined, and the deeds not proved by either party, but other evidence was given nearly similar to that which appears upon the depositions in equity on the part of the Plaintiff. The Defendant produced no witnesses; whereupon the jury found that, in the event of *any assignment* having been made, as to two-thirds thereof, it was obtained by undue influence.

A motion to set aside this verdict, and grant a new trial, was refused, and upon a re-hearing, a decree was made in favour of the Plaintiff.

This decree was affirmed on appeal.

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THE Respondent in 1824 exhibited his original bill in Chancery, in Ireland, against the Appellant, and also against the corporation of the Royal Exchange Assurance of London, stating that John Atkinson, in April, 1819, being desirous, in the event of his death, to secure a competency for his wife, effected a policy of insurance on his life, with the Royal Exchange Assurance of London, for the sum of 3,000*l.* and thereupon paid the annual premium for the first year: that John Atkinson had been for many years an army agent, and that the Appellant was his chief and confidential clerk, and in such capacity obtained his implicit confidence, and exercised an almost unbounded influence over him: that John Atkinson continued to the time of his death, to pay the premium on the po-

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## IRELAND.

(COURT OF CHANCERY.)

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It appeared also in proof of the charge of influence, that C. had declared when the codicil was in contemplation, that none should be executed unless he chose; and when the letter was found in the will, that he said he could ruin the credit of the house and the character of the testator. Upon this, and other

evidence, an issue was directed at the instance of the Defendant, to try whether the assignments as to two thirds of the sum insured, were the free and voluntary acts of the testator, or extorted from him by threats or undue influence, or obtained by fraud: the Defendant, upon the trial of this issue was to produce the deeds of assignment, and the attesting witnesses.

Upon the trial of the issue, the letter found enclosed in the will was tendered in evidence by the Plaintiff; but rejected. The deeds of assignment and the attesting witnesses were produced by the Defendant; but the Plaintiff declined proving them, and the witnesses were not examined, and the deeds not proved by either party, but other evidence was given nearly similar to that which appears upon the depositions in equity on the part of the Plaintiff. The Defendant produced no witnesses; whereupon the jury found that, in the event of *any assignment* having been made, as to two-thirds thereof, it was obtained by undue influence.

A motion to set aside this verdict, and grant a new trial, was refused, and upon a re-hearing, a decree was made in favour of the Plaintiff.

This decree was affirmed on appeal.

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THE Respondent in 1824 exhibited his original bill in Chancery, in Ireland, against the Appellant, and also against the corporation of the Royal Exchange Assurance of London, stating that John Atkinson, in April, 1819, being desirous, in the event of his death, to secure a competency for his wife, effected a policy of insurance on his life, with the Royal Exchange Assurance of London, for the sum of 3,000*l.* and thereupon paid the annual premium for the first year: that John Atkinson had been for many years an army agent, and that the Appellant was his chief and confidential clerk, and in such capacity obtained his implicit confidence, and exercised an almost unbounded influence over him: that John Atkinson continued to the time of his death, to pay the premium on the po-

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## IRELAND.

(COURT OF CHANCERY.)

MICHAEL COLLINS - - - - - *Appellant.*The Reverend CHARLES HARE - - *Respondent.*

A., an army agent in Dublin, having effected a policy of insurance on his own life for 3,000*l.*, in 1819, by an informal instrument, attested by two witnesses, assigned the policy to C., who had been for many years his confidential clerk. From the time of the assignment A. paid two-thirds, and C. one-third of the premium. In 1821, by a more formal instrument, drawn up by a professional person, he executed a further assignment of the policy. In the first instrument, the consideration expressed for the assignment is, "*regard and affection*;" in the second, "*friendship and affection*." The last assignment was drawn up by the Attorney of C., and both the instruments were drawn up and executed, without the knowledge of A.'s family.

By a codicil to his will, A. gave to C. a legacy of 100*l.*, as a further mark of his regard and affection. Upon the death of A., a letter addressed to his son was found enclosed in his will, stating that the assignment had been extorted from him by C., by threats and undue influence.

Upon a bill filed by H., as executor of A., to set aside the assignment on the ground of fraud, and undue influence, C. by his answer claimed the interest under the assignment, as a compensation given to him by A., in the place of an increase of salary. Upon the depositions it appeared in evidence that C. had given different accounts of the object of the policy, viz. that it was effected as a provision for the wife of A., and that it had been given to him, for making up the accounts of A., in a way to deceive government.

It appeared also in proof of the charge of influence, that C. had declared when the codicil was in contemplation, that none should be executed unless he chose; and when the letter was found in the will, that he said he could ruin the credit of the house and the character of the testator. Upon this, and other

evidence, an issue was directed at the instance of the Defendant, to try whether the assignments as to two thirds of the sum insured, were the free and voluntary acts of the testator, or extorted from him by threats or undue influence, or obtained by fraud: the Defendant, upon the trial of this issue was to produce the deeds of assignment, and the attesting witnesses.

Upon the trial of the issue, the letter found enclosed in the will was tendered in evidence by the Plaintiff; but rejected. The deeds of assignment and the attesting witnesses were produced by the Defendant; but the Plaintiff declined proving them, and the witnesses were not examined, and the deeds not proved by either party, but other evidence was given nearly similar to that which appears upon the depositions in equity on the part of the Plaintiff. The Defendant produced no witnesses; whereupon the jury found that, in the event of *any assignment* having been made, as to two-thirds thereof, it was obtained by undue influence.

A motion to set aside this verdict, and grant a new trial, was refused, and upon a re-hearing, a decree was made in favour of the Plaintiff.

This decree was affirmed on appeal.

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THE Respondent in 1824 exhibited his original bill in Chancery, in Ireland, against the Appellant, and also against the corporation of the Royal Exchange Assurance of London, stating that John Atkinson, in April, 1818, being desirous, in the event of his death, to secure a competency for his wife, effected a policy of insurance on his life, with the Royal Exchange Assurance of London, for the sum of 3,000*l.* and thereupon paid the annual premium for the first year: that John Atkinson had been for many years an army agent, and that the Appellant was his chief and confidential clerk, and in such capacity obtained his implicit confidence, and exercised an almost unbounded influence over him: that John Atkinson continued to the time of his death, to pay the premium on the po-

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licy, and that the sum insured formed a principal part of the assets of John Atkinson : that the Appellant had the care of the books of J. Atkinson, and access to all his papers, and had obtained the possession of the policy, and of other papers, books, and vouchers, of the testator, and had taken copies thereof, which he refused to give up to the Respondent : that the Appellant, during the last years of J. A.'s life, had complete dominion over his office, and all the papers and documents therein, J. A. having been, from extreme ill health and infirmity of body, unable to attend to business, or even to take care of his private affairs, and having during such the period of his illness and debility, confided all his affairs, books, and papers to the Appellant : that in such his disability for business, John Atkinson was in the habit of signing and subscribing any such papers as Appellant required him, without reading or being particularly apprized of the contents thereof; and that, feeling himself in his then situation to be much in the power of Appellant, he did not, nor could refuse, to do any act required of him by the Appellant.

The bill further stated that John Atkinson died on the 30th of October, 1823, having made and published his will, bearing date the 29th of August, 1823, and appointed the Respondent sole executor; and that he had since proved the will, in the Court of Prerogative in Ireland, and taken upon himself the execution thereof : that shortly after the death of John Atkinson, a letter from him, dated the 15th of October, 1823, was found enclosed in his will, directed to his son, John Atkinson the younger, in the following words, videlicet :—

“ My dearest John, as you have told me that you know I have insured my life, through one of the

“ office-keepers, who called for payment for 131*l.*, for  
 “ the policy of insurance, and have asked me in my  
 “ dying bed, what has become of it, I cannot refuse  
 “ but tell you the truth, that it was extorted from me  
 “ by Mr. Michael Collins, by threats and undue influ-  
 “ ence: the policy for which I pay, is for 2,000*l.*  
 “ (Signed.) John Atkinson.”

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The bill then proceeded to state that the policy being in the hands of the Appellant, at the time of the death of the testator, and the testator having kept the state of his affairs secret from the members of his family, the Respondent was entirely ignorant of the existence of the policy, or its amount; but that in consequence of the letter, the Respondent applied to the agent of the corporation in the city of Dublin, when he discovered that it was effected for the sum of 3,000*l.*: that on the 3rd of November, 1823, the Respondent caused a notice to be served on the Appellant, requiring him to surrender the policy of assurance for 3,000*l.*, which the testator effected upon his life; and on the 24th of the same month, he served the Royal Exchange Assurance Company with notice not to pay the 3,000*l.* or any part thereof to the Appellant: that the Appellant refused to deliver up the policy, alleging that he was entitled to the whole of the proceeds.

The Respondent by his bill charged, that the policy had not been at all assigned to the Appellant, or if an assignment was made, that it was obtained by means of fraud, misrepresentation, and undue influence, and without any consideration; that the Appellant had himself confessed that he was only entitled to one-third part of the policy, the remaining two-thirds being a trust for the testator, and the Respondent, as his executor; as evidence whereof, the Respondent charged, that subsequently to the alleged

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assignment, and down to the time of his death, the testator continued to pay two-thirds of the premium on the policy, and it was admitted and declared, by the Appellant, that the testator paid the premium on two-thirds, and was the owner of two-third parts thereof, he only claiming to be entitled to one-third.

The bill prayed, that the Royal Exchange Assurance Company might be restrained, by the injunction of the Court, from paying over to the Appellant the amount of the policy, and that they might also bring into Court the sum of 3,000*l.*, to abide the decree of the Court; and that it might be decreed to be part of the assets of the testator; and that the assignment (if any) might be set aside, and decreed to be null and void, or a trust for Respondent, or might stand as a security only for the sum due thereon (if any) to the Appellant; and that the Appellant might be restrained from proceeding at law on the foot of the policy against the Assurance Company.

The Respondent by his bill also prayed an account on the foot of the transactions between the Appellant and the testator, which account was waived, on the hearing of the cause.

The Appellant, in February, 1824, answered the bill; he admitted that the testator effected the policy on the 20th of April, 1819, and claimed to be entitled to the entire benefit of the policy, under two assignments made to him by the testator; the first bearing date the 23rd of April, 1819, and the second bearing date the 21st of April, 1821. He admitted that he had paid one-third only of the premium on the policy after the first assignment, and that John Atkinson had paid the remaining two-thirds yearly; he alleged that the assignments were respectively made to him, by the testator, in order to make a provision for him, and in consideration of the valuable services

rendered by him as clerk to the testator. The Appellant also by his answer admitted that he had taken in the testator's lifetime, and had in his possession abstracts from the books of account of the testator, which did not relate to the Defendant's private account, and that he had at all times access to, and the chief management and control of the testator's books of military accounts.

He relied on these allegations of his answer, and on a codicil made by the testator in his last illness, the day before the date of the letter to his son, whereby a legacy of 100*l.* was left to the Defendant to be paid on the settlement and discharge of the accounts of the house.

On the 4th of March, 1824, an application was made to the Court on behalf of the Respondent for an injunction to restrain the Appellant from receiving, and the then Defendants, the Royal Exchange Assurance Company of London, from paying over to the Appellant the sum of 3,000*l.*, the amount of the policy, which was ordered accordingly.

By a consent order, dated the 23d of June, 1824, one-third of the amount of the policy was paid over to the Appellant by the Royal Exchange Insurance Company, and the remaining two-thirds were vested in stock in the name of the Accountant General to the credit of the cause; the Defendants, the Royal Exchange Assurance Company, were struck out of the bill, and the bill was amended under the consent order accordingly.

The first assignment, dated the 19th of April, 1819, was by an instrument signed, sealed, and attested by two witnesses, expressed thus: "I do hereby assign  
" all my right, title, and interest in the policy of assurance, &c. (describing it) to Mr. Michael Collins,

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“ of, &c., as a mark of my affection and regard for him ; and I do hereby authorize and empower the directors of the Royal Exchange Insurance Company, &c. to pay to the said Michael Collins, or his assigns, the sum of 3,000*l.* payable by them, &c. In witness, &c. (signed) John Atkinson.”

The second instrument, dated the 21st of April, 1821, was a regular indenture of further assignment of the same policy ;—J. A. granting it to M. C., for divers good causes and considerations, from the friendship and regard which he bore to M. C., and also in consideration of five shillings.

By the depositions in the cause, it was proved that the testator had for some years before his death been in a weak and infirm state of health, and incapable of attending to his affairs as closely as he used to do ; that the Appellant had been the confidential clerk and book-keeper of the testator ; that he had a considerable influence over him ; that he made the entries, wrote the letters, and took and kept abstracts from the accounts of the house ; that the testator signed letters and other documents which were presented to him by the Appellant, without reading them ; that the Appellant boasted of the power he had over the testator, and the services he had rendered to the testator in the manner in which he made up his accounts with the government, and that by means of these accounts and his knowledge of them, he had Mr. Atkinson in his power, and that he could ruin the house and the private character of the testator ; that the Appellant declared that the assignments of the policy were granted to him for making up the general accounts in a way to deceive government ; that the Appellant had, up to the year 1818, a salary of 200*l.* ; that in the year of 1818, the salary was increased to 300*l.* a

year, and continued at that sum to the testator's death: that the average profit of the office of the testator was in 1818, about 748*l.*, in 1819, about 567*l.*, in 1822, did not exceed 100*l.*, and that in the year 1823 it was not sufficient to pay the Appellant's salary.

It was also proved that the testator left his family in very narrow circumstances, at the time of his death: that the Appellant had offered, after the testator's death, to give up the policy, and said that he had a deed prepared for that purpose: that the Appellant boasted that the testator could not make a codicil to his will, without his consenting to it. Proof was also admitted, that the letter dated the 15th of October, 1823, was of testator's hand-writing, and found with his will and codicil, and that after the testator's death, it was read in the presence and hearing of the Appellant: it also appeared in proof, that the assignments of the policy were executed by the testator, without the knowledge of his professional adviser, who was usually employed and consulted by him in all law affairs, and without the knowledge of any of the members of his family; and that the Appellant had said, when asked about the insurance in the lifetime of the testator, that it was an insurance for the benefit of the testator's wife.\*

The cause was heard before the Lord Chancellor of Ireland; and on the 28th of April, 1825, his Lordship pronounced an order, that the Respondent should forthwith commence a feigned action in the Court of King's Bench, in Ireland, against the Appellant, to

\* The substance only of the evidence is shortly stated. It appears more fully in the argument, and the Lord Chancellor's speech on moving Judgment.

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which the Appellant was forthwith to appear and plead the general issue, and admit all matters of form, and that the question to be tried, should be the issue following, to wit, "whether the assignments of the 23d of April, 1819, and the 21st of April, 1821, were, as to two-thirds of the sum insured, the free and voluntary acts of the testator, or whether the same were extorted from him by threats and undue influence, or obtained from him under any circumstances of fraud: and it was further ordered, that the Defendant Michael Collins, should be under the terms of producing on such trial the assignments, and the witnesses thereto, and also the person who drew the assignment of the 21st of April, 1821; and the Judge before whom such trial should be so had, was thereby desired to certify to the Court the verdict that should be given; and further directions were reserved until the return of the Judge's certificate.

The feigned action was tried before the Lord Chief Justice of the Court of King's Bench, in Ireland, when the jury found a verdict for the Respondent, and the Chief Justice certified that the issue was tried before him and a special jury of the county of the City of Dublin, on the 4th day of July, 1826, when the jury by their verdict found, "*that in the event of any assignments having been made by the deceased, they were (as to two-thirds of the sum insured by the policy of insurance, therein mentioned,) obtained by undue influence.*"

Upon the trial the Appellant produced the deeds of assignment, the attesting witnesses, and the attorney who prepared the second deed. But the counsel for the Respondent declined proving the deeds, or examining the witnesses. The assignments were not proved by either party; and the Appellant

conceiving, that for want of such proof, the Respondent had failed to establish his case, did not call witnesses, which, as he alleged, he had in attendance.

Under these circumstances a motion was made before the Lord Chancellor, on behalf of the Appellant, that the verdict should be set aside, and a new trial directed, on the grounds that the verdict was against evidence, and against the charge of the Judge, and without a sufficient investigation of the facts bearing upon the issues directed to be tried, and because the verdict under the circumstances in which it was delivered could not give satisfaction to the Court.

By an order of the 3d of December, the motion was refused, with costs.

The cause was heard on the Judge's certificate, on the 16th of February, 1826, when, on the application of counsel on behalf of the Appellant, it was ordered that the Defendant should be at liberty to petition forthwith for a re-hearing, and the cause having been accordingly re-heard on the 2d of March, 1826, it was decreed, that the assignments of the policy of insurance, dated respectively the 23d of April, 1819, and 21st of April, 1821, so far as they related to two-thirds of the policy, were fraudulent and void, and that the sum of 1,818*l.* 6*s.* 10*d.*, 3½ per cent. stock, and the sum of 95*l.* 9*s.* 3*d.* cash then remaining in the Bank, to the credit of the cause, being the produce of two-thirds of the said policy of insurance, were part of the assets of the testator, John Atkinson, deceased, and that the Respondent was entitled to his costs of the suit, both at law and in equity, and the Respondent, waiving the accounts, prayed by his bill, that the Accountant General should transfer to the Respondent, or his attorney thereto lawfully authorized, the sum of 1,818*l.* 6*s.* 10*d.*, 3½

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per cent. stock, and should also draw in favour of Respondent, or his attorney thereto lawfully authorized, for the sum of 95*l.* 9*s.* 3*d.* so remaining in the Bank to the credit of the cause.

From the decretal order of the 28th of April, 1825, the order of the 3d of December, 1825, and the decree of the 2d of March, 1826, the Defendant in the Court below appealed to the Lords in Parliament.

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For the Appellant—*Mr. Horne* and *Mr. Bethell*.

Ascendancy of a servant over his master ought not to be presumed to result from the relation between them; the nature of the transaction, and its circumstances in the manner and order of their occurrence are such as not only do not afford any internal evidence or ground for suspicion of fraud, but give the strongest confirmation to the sworn statements of the Appellant in his answer, and lead to a contrary conclusion; and therefore the Court ought not to have acted except on direct testimony of actual fraud. No evidence was adduced by the Respondent on the hearing of the cause in equity, which proved a case of fraud against the Appellant, in obtaining the assignments in question from the testator.

The Respondent's case, as made by the bill, rests upon the allegations of an undue advantage taken of the mental weakness of the deceased, which had been occasioned by bodily infirmity. But his witnesses, on the contrary, agreed, that the deceased was in the enjoyment of good health at the time of this transaction; and laboured under no weakness of mind from that or any other cause:—it appears, that his soundness of understanding and attention to and control over his business continued unimpaired till within a

few months previous to his decease. If, however, a solemn instrument be impeached on the ground of the grantor's incapacity, or of fraud, the fact should be proved by evidence directly relating to the transaction. The rest of the Respondent's evidence consists of the letter of the testator, of the 15th of October, 1823, and the testimony of his witnesses, as to the language of the Appellant, at the meeting of Mr. Atkinson's relations on the day of his decease.

The letter was not admissible in evidence ; and, if admissible, ought not, under the circumstances of this case to have been received in a Court of Equity. The false and contradictory account it gives of the transaction, and its inconsistency with the feelings of kindness and bounty towards the Appellant, which are manifested by the testator, in his codicil of the same date, render it impossible to believe that it was the deliberate and voluntary act of the deceased. With respect to the language imputed to the Appellant by the Respondent's witnesses, a Court of Equity ought not to have used it as a ground of judicial inference ; because, a decision ought not to be founded upon facts which are not put in issue in the cause, especially in a Court of Equity, where the injustice of so doing will become more evident from adverting to the nature of the proceedings, and the mode of examination of witnesses established in such courts. But, independently of this general principle of justice, any inconsiderate expressions, such as are imputed to him by the evidence in this cause, regard being had to the occasion when they are stated to have been used, and their being in answer to the threats and imputations cast upon him, cannot be judicially taken against him as an admission of a fact, which, on all other grounds, it is impossible to believe

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Such evidence, therefore, ought not to have influenced the Court in directing the issue; nor ought a verdict, which was founded on such evidence alone, to have been satisfactory to it.

Admitting this to be a case where the Court ought not to have refused an issue, it was incumbent on the Court to have provided with certainty, that both the form and language of the issue, and the manner and circumstances of the trial, should be such as to bring the true points in the cause before the jury, which cannot be gathered either from this issue or the trial. But, in fact, regard being had to the nature of the case, and the evidence properly admissible in the cause, no issue ought to have been directed, but the bill ought to have been dismissed with costs, against the Appellant.

The letter of the testator was not admissible to destroy the effect of his own deed. It was rejected at law, and ought not to have been admitted in equity. The letter is contradicted by the codicil, dated almost at the same moment, and giving a legacy to the Defendant, as a farther mark of regard and esteem. The deed of assignment contained no covenant binding the testator to continue the payment of the premiums, yet he continued them to his death. The son knew of the assignment before the death of the father, and might have interposed; at all events there should have been a new trial. As the matter stands, there is no proof of any assignment, and the principal witnesses to the transaction have not been examined.

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For the Respondent — *Mr. Sugden* and *Mr. Spence*.

The decree of the 28th of April, 1825, is well warranted by the principles and practice of Courts

of Equity, and the particular nature of the case itself. There was proof sufficient made by the Plaintiff in the equity cause, to sustain a decree for setting aside the assignments relied upon by the Appellant as to two-third parts of the policy of insurance, and the issue directed was for the purpose of satisfying the conscience of the Lord Chancellor as to the proofs so made. The direction of issues in such a case is conformable to the principles and practice of Courts of Equity. The Appellant did not object to the issue as directed, but asked for it in preference to a decree against him which would have been pronounced had he declined the issue. The order of the 3d of December, 1825, was right, inasmuch as the verdict was conformable to law and to justice, was founded upon cogent evidence, and not contradicted by any evidence on the Appellant's part. The decree of the 2nd of March, 1826, is warranted by the verdict as well as by the proofs and pleadings in the cause.

It would be against public policy, and the principles of equity to affirm instruments obtained clandestinely by a clerk from his employer without consideration, and in both instances kept concealed from the confidential attorney and friend, and also the relatives of the grantor.

The expression in the codicil of regard and affection follows the name of another legatee, which is coupled with that of the Defendant, and the codicil itself is impeached. It was the business of the Defendant on the trial to prove the assignment. He refrained, from fear of cross-examination. The attesting witnesses probably knew of nothing but the execution.

*The Lord Chancellor.*—This appeal is principally, if not entirely, on a question of fact. The counsel for

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the Defendant not being satisfied with the opinion of the Lord Chancellor of Ireland, an issue was directed.

The case came on for trial before the Lord Chief Justice of the Court of King's Bench. The jury gave a verdict corresponding with the opinion of the Lord Chancellor. An application was then made for a new trial, and, after hearing counsel for several days, the new trial was refused. Under these circumstances it would require a satisfactory case to rescind the decision.

The question arises upon the assignment of a policy of assurance. (Here the Lord Chancellor stated briefly some of the facts of the case.) The assignment was executed in private, and attested by two witnesses; but they probably knew nothing of the transaction. (Here the Lord Chancellor read the assignment of 1819.) This was done in 1819. In 1821 another assignment was executed in a more formal manner, by deed regularly drawn and prepared obviously by a professional person. Why a second assignment was executed does not appear.

In 1823 Collins was taken into the partnership. On that occasion letters commendatory of Collins were sent to their correspondents. But it appears that Collins, who had great control and influence over Atkinson, was in the habit of writing letters and accounts which were signed by Atkinson without investigation. It appears also that a few days before Atkinson's death a codicil was drawn up under the influence of Collins, by which 100*l.* was given to him, as in the codicil it was expressed, as a further mark of esteem. On the death of Atkinson, the letter addressed to his son, alleging that the assignment was extorted, was found inclosed in his will. (Here the Lord Chancellor read the letter.) The policy was

for 3,000*l.*; the premium for 2,000*l.*, was paid by Atkinson, for 1,000*l.* by Collins.

These are the facts of the case up to the death of Atkinson, and they furnish many circumstances of strong suspicion : in the first place the motive for the assignment of the policy was put by Collins, on the ground of inadequacy of salary, and further remuneration ; but it turned out that in 1818 the salary was 200*l.* : from that time it was 300*l. per annum* : and during the same period the profits of the business varied from 800*l. per annum* downwards, and in one year it was a losing concern. Under these circumstances it is extraordinary to say that the concern was sufficient to afford a larger salary than 300*l.*, or that the policy could have been assigned for that reason. In the next place it is singular that a second assignment of the policy, prepared by a professional man, should have been executed, nobody being called in on the part of Atkinson. The gentleman who had always been consulted by the testator, proved that he was not consulted on this occasion : the whole transaction was kept secret. But a fellow clerk had heard that this insurance had been effected, and questioned Collins on the subject, who said that it was a little provision for the testator's wife : and while the codicil was under preparation, a few days before the death of the testator, Captain Atkinson, his son, having complained of delay, the Defendant turned round to the clerk and said, no codicil should be executed unless he chose. This is a material fact, and there is other evidence that the testator acted under the control of Collins, the clerk. When the letter was discovered, after the death of Atkinson, a conversation took place in which Collins said that he could destroy the credit of the house by producing the public ac-

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counts. It appears that the Appellant had Atkinson under his influence, by the manner of keeping these public accounts; which was the cause of executing the assignment, and also the codicil giving 100*l.* to Collins as a further mark of approbation.

Upon the urgency of counsel an issue was directed. The case was heard before the Lord Chief Justice: witnesses for the Plaintiff were examined: Collins's counsel called no witnesses. The jury, under the direction of the Lord Chief Justice, found for the Plaintiff. The Lord Chief Justice directed the jury, "that as neither party had proved the instruments, "or examined the attesting witnesses, or the person "who drew the last assignment, they could know "nothing of the contents or the facts attending the "executions or the consideration, except what might "be collected from the conversations in the presence "of both parties, which had been given in evidence; "and that the question which arose upon that evidence was, whether Atkinson executed the assignment under an apprehension communicated or suggested to him by the Defendant: that the Defendant "had it in his power to destroy his character, and "ruin the credit of his house, by exposing frauds in "the public accounts of the house with government, "kept by the Defendant for the deceased; and that "he would do so unless those policies were assigned "to him, &c. Upon this direction the jury found "that in the event of any assignment having been "made by Atkinson, &c., it was obtained by undue "influence." The evidence before the jury consisted of admissions by Collins, which might have been the foundation of the verdict. It was suggested that the Lord Chief Justice was not satisfied with the verdict.

But from the conversation which he had with Lord Manners, it appears that he was satisfied.

In point of form there is some objection. The assignment was not produced in evidence; but it was competent to the Defendant to prove it. The real question was in substance tried on that occasion, and it is not sufficient to reverse such a decision that there is some defect in point of form. An issue is to inform the conscience of the Judge who directs it, and if he has all the evidence before him, an omission to prove an instrument upon the trial of the issue, is not a ground to direct a new trial, especially as the Lord Chief Justice was satisfied.

Taking all the evidence together, I should have concurred with the jury. The matter was originally heard at great length in equity, upon a question of fact, which has been duly investigated, and the verdict of a jury corresponded with the opinion of the Judge in equity. The case coming back again, was thoroughly sifted and examined upon a re-hearing.

Under these circumstances it would require a very strong case to reverse such a decision. My opinion is, upon the facts in evidence, that the judgment is right, and, unless some doubt were expressed on the question, I should move that the judgment be affirmed.

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Judgment affirmed, with 100*l.* costs.

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## ENGLAND.

(COURT OF CHANCERY.)

W. R. P. TYLNEY LONG WELLESLEY } *Appellants.*  
and others, infants, by their next friend }

The HON. W. POLE TYLNEY LONG } *Respondent.*  
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The Court of Chancery has jurisdiction to appoint a guardian for infants, being Wards of the Court, excluding the father; and upon evidence that the father was living in a state of adultery, and had encouraged his children in swearing, keeping low company, &c.; it was held a fit case to exercise the power to exclude him from the guardianship.

THE question upon this appeal was, whether the Appellant, *jure paterno*, was intitled to the custody of his children, or whether the Court of Chancery had jurisdiction to deprive him of that custody, and to appoint another guardian for the children; and whether that jurisdiction, if it existed, was properly exercised under the following state of circumstances.

The Appellant, in 1812, married Catherine Pole Tylney Long. By the settlement made upon the marriage, 13,000*l.* a year was settled upon her as pin-money, and, subject to that annuity, her lands in fee-simple were settled upon the Appellant for life. The lands to which she was intitled in fee-tail, under the will of Sir James Long, were settled upon the Appellant during the joint lives of himself and his wife. Out of these lands, portions for the younger children were to be raised, under an appointment made

by Mrs. Wellesley, according to a power vested in her by the will. Subject to these portions the lands vested in the eldest son, as tenant in tail upon the death of Mrs. Wellesley.

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In 1821 the Appellant, accompanied by his wife and family, went abroad, to avoid his creditors, and there he formed an adulterous connexion with Mrs. Helena Bligh, which caused a separation between him and his wife. He continued to reside and cohabit with Mrs. Bligh at Paris. Mrs. Wellesley, in 1824, proceeded to England, taking with her, by his permission, a daughter and two sons, the issue of the marriage. In 1825 proceedings for a divorce were commenced by Mrs. Wellesley in the Ecclesiastical Court; and a bill in Chancery was also filed by her direction, to make her infant children wards of the Court, with a view to prevent their abduction by force or stratagem, on the part of the Appellant.

In September, 1825, Mrs. Wellesley died, having committed her children to the care of her sisters, the Misses Long, with a death-bed request that they would not permit the Appellant to get possession of them. On the 30th of September a bill was filed in the name of the infants by their next friend, against the persons having the legal estate in property which they held in trust for the infants, praying the usual accounts; that the portions of the younger children might be raised; and that a proper person might be appointed to have the care of the persons of the three infants, during their minorities, with an allowance for their maintenance.

After the death of Mrs. Wellesley, the Appellant applied to the Misses Long, and requested them to deliver the children to his custody, which they refused. In October, 1825, he procured a writ of *habeas corpora* from the Court of King's Bench,

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which was served on the solicitor of the Misses Long. On the 3d of November, and before the return of the writ, a petition was presented to the Lord Chancellor in the names of the infants, to restrain him from prosecuting the writ; and in consequence of an opinion expressed by the Lord Chancellor, that he could not have the custody of the infants while he was abroad, he desisted from prosecuting the writ.

In November, 1825, the Appellant, being still abroad, presented a petition praying a reference to one of the Masters of the Court, to approve of a plan for the education of the infants, and a suitable establishment for their residence.

On the 9th of November, the Lord Chancellor made an order of reference as to a plan of education, and an establishment for residence; and that the Master should approve of a proper person to act as guardian to the infants, and "state to the Court what relations, *other than their father*, the infants had, &c. &c.; and that the Appellant should be restrained from interfering with the infants, &c."

On the 14th of December, the Appellant presented a petition, stating his intention to reside in England where he then was, and claiming, as the father and natural guardian, the custody of the infants, and the management of their education. The petition prayed, "that the order of the 9th of November, 1825, might be rescinded, and that the Misses Long might on a day to be named deliver over the infants to their father."

In support of this petition, and in opposition to it, various affidavits were filed, which, as to many of the allegations, were directly contradictory. After argument, additional affidavits on both sides were filed upon the suggestion of the Lord Chancellor.

In the meantime the adulterous intercourse between

the Appellant and Mrs. Bligh continued, and damages had been recovered in an action for *crim. con.* by the husband against the Appellant.

In January, 1827, the petition again came on for hearing. The evidence consisted of affidavits to the number of forty; letters from the Appellant to his children and his wife; and from her to him, and others.

The case made against the Appellant upon this evidence was general ill treatment of his wife, an adulterous connexion continuing to the time of making the order and the encouragement of the children in habits of swearing, and keeping low company. Letters were produced, written by the Appellant to his sons, in one of which, in the midst of much good moral advice, he says, "If the fellow be a sportsman who told you, &c., *"damn his infernal soul to hell:"* In another, "study hard, but as soon as you have completed your tasks, go out, in all weathers, *and play hell and Tommy,* &c., chase cats, dogs, and women, old and young, but spare my game." In another letter, written to the tutor of his sons, complaining of the interference of Mrs. Wellesley and her sisters, whom he suspected of being fanatical, or over-religious, he says, "there are certain things which ought to be let alone, a man and his children ought to be allowed to go to the devil their own way, if he pleases."

On the 1st of February, the Lord Chancellor made an order, by which, reciting that the affidavits, filed in the matter of the petition, to the number of forty, had been read, he ordered that it should be referred to the Master, to enquire and report to what person or persons (other than the Appellant,) the custody of the infants, and the care of their maintenance and education should be committed, &c., and that the Appellant, and all other persons should be restrained from removing, or attempting to remove the infants,

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or any of them, from the care and custody of the Misses Long, &c.

Against this order the appeal was presented.

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For the Appellant—*Mr. Horne, Mr. Brougham,*  
 (and *Mr. Beames*).

For the Respondents—*The Attorney General,*  
 and *Mr. Pepys*.\*

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*Lord Redesdale*.—I have given to this case all the attention which it is possible for me to give; and I have not the slightest hesitation in saying, that I think the order which has been pronounced in the Court below, ought to be affirmed, supposing that Court had authority to make the order. I am also of opinion that the Court is authorized to make such an order, according to all the principles that have been acted upon, from the earliest period down to the present time.

What is the ground on which the opposition is made to this order? The opposition is founded on the right of the father to have the care and custody of his children. That right is not disputed by the order; but the question is, whether the father having that right, is to be at liberty to abuse that right. That is the real question. Why is the parent entrusted with the care of his children? Because it is generally supposed he will best execute the trust reposed in him; for that it is a trust, of all trusts the most sacred, none of your Lordships can doubt.

If a guardian is appointed under the statute, which enables the father to appoint a guardian, the counsel at the bar have not disputed that that is a trust; it is a

\* The arguments and authorities did not materially differ from those which appear reported as upon the hearing in the Court below. See 2 Russell's Rep. p. 1.

delegated trust; a trust, which the law has enabled the father, when he ceases to live, to give to others for the benefit of his children; but if the father abuses that trust, if he appoints improper persons to be the guardians of his children, is it doubted, that a court of justice can interfere, and can prevent that misapplication of the power, which is given to the father? If, on the contrary, the father meant well to execute the trust, but has been deceived, and has appointed for the purpose a person improper to be entrusted with the care of the children, is it questioned, or has it been questioned at the bar, that some Court, or that the Court which has made this order, has a right to interfere, to control the conduct of the person so delegated by the will of the father?

I apprehend, it is impossible to say that the father has that absolute right, which is contended for at the bar. What are the grounds on which the custody of the children is given to the father? First, protection, then care and education. Is it not clear, that if the father does not give that protection, does not maintain the child, that the law interferes, for the purpose of compelling the maintenance of that child? Is it not clear, that if the father cruelly treats the child in any manner, that a court of criminal jurisdiction will interfere, for the purpose of preventing that treatment? Is it to be said then, there is no jurisdiction whatsoever in this country, that can control the conduct of the father in the education of his children? If a stranger was to enter into this house, and hear what was argued on that subject, would it not strike him with astonishment that the law of this country should not have provided for such a case?

We find that now, for a hundred and fifty years, the Court of Chancery has assumed an authority with

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respect to the care of infants ; and it has assumed that authority, to the extent in which it was assumed, for this reason : as long as the feudal tenures remained, generally speaking, infants who had lost their parents, were under the protection of the law which then existed, with respect to the treatment and the care of the children. When that was at an end, it was thought fit, by a particular statute, to enable the father to make an appointment of a guardian for his children, giving to him the power which that statute gave, to select proper persons for that purpose. As I observed before, if he makes an improper selection, if the person whom he has so selected, misconduct himself, it is perfectly clear, that a power has been assumed to control that conduct.

Now, upon what does Lord Somers, upon what does Lord Nottingham, upon what does Lord Hardwicke, upon what ground does every Chancellor who has been sitting on the bench, in the Court of Chancery since that time, place the jurisdiction ? They all say, that it is a right which devolves to the Crown, as *parens patriæ*, and that it is the duty of the Crown to see that the child is properly taken care of.

We all know that many jurisdictions are given to the Crown, many powers are given to the Crown ; but those powers are all to be exercised by responsible ministers. It is not the king who takes on himself to determine who is to be a proper guardian of the children ; but he is to delegate to different ministers, the different kinds of powers which belong to him, that there may be, according to the language of our law, persons responsible to the king and the people, for their good conduct, in the administration of their trust. I, therefore, have no doubt in the world, that it must be taken, to be a jurisdiction rightly assumed ; for a hundred and fifty years past,

unquestionably assumed by the Chancellors sitting in the Court of Chancery.

Lord Somers resembled the jurisdiction over infants, to the care which the Court takes with respect to lunatics, and supposed that the jurisdiction devolved on the Crown, in the same way. There is no particular law upon the subject; the law merely declares that the king has the care of the persons who are of insane mind, and that he is to take care of their property. If they are absolute idiots, the property devolves to him during their lives, and he is to provide only for their maintenance. If they are not idiots, but persons who have lucid intervals, then the king is to take care of their property, to take care of their persons, to take care of their maintenance: and whatever property may be accumulated in the mean time, he is a trustee of it for the benefit of those who may be entitled at their death, or to them, if they should ever recover. With respect to the case of infants, can there be a stronger proof that it was conceived to be reserved to the Crown than this:—that the City of London claim, as an immemorial right, and a right which must have been derived to them from the Crown, the care of orphans, and that they have most extraordinary powers for that purpose, extending to enable the Court of Orphans to commit to Newgate a person who disobeys their order? That has been allowed in a Court of Common Law, and it is founded upon usage, which must have been founded originally upon a grant from the Crown, of such powers to the Corporation of London.

I think there can be no doubt, therefore, that the law of this country has reserved to the king the prerogative for the protection of infants, to be executed

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in such a manner as the constitution requires him to execute all his prerogatives. If we look to this case with respect to the father, why is the conduct of the father not to be considered as a trust, as well as the conduct of a person appointed as guardian? It is true that the law has not authorised the compelling a father to furnish means of maintenance beyond actual maintenance. You cannot say that the father, whatever his property may be, shall allow to the child so much or so much for the maintenance and education of the child; the law compels him to maintain that child. If he refuses, he may be compelled to maintain him; but the law can do no more than compel bare maintenance. But, if the child has property of his own, then there is a right to apply that property, which belongs to the child, most beneficially for the purposes of the child's support and education.

In this case, the children who are the objects of your Lordships' attention, have property, and, through the medium of that property, a maintenance may be applied for them. The children were, at the time of the death of their mother, under her care. If they had had no property whatsoever, it would have been extremely difficult, unquestionably, for the Court of Chancery to have found the means of maintaining them according to their rank and situation; because, they have no power to compel Mr. Wellesley to do more than to afford them bare maintenance, and that in another mode of proceeding. But, as they have property, it was thought fit, on the death of their mother, and upon Mr. Wellesley proposing to take the children under his immediate care, to file a bill in the Court of Chancery against the persons who were in possession of that property, to compel

those persons to apply the income of that property for the benefit of those children. Those persons had no right to make that application of the property, no unquestionable right, without the intervention of the Court, because, having a father, and he being bound to maintain them, it would not have been allowed to those trustees to expend money in their maintenance without the authority of the Court for that purpose.

Upon what ground is the Court required to maintain these children out of their own property, and not at the expense of the father? It is because that father is an improper person to have the care of these children; and, as it is proposed that their maintenance and education should be put out of his control, it is, therefore, as he may refuse to afford them more than will supply them with their bare maintenance, which the law of the country would require from every person who had the means to maintain his children; it is for that reason that the Court is to take upon itself, out of the property that those children have, instead of accumulating the income of their property for their benefit, till they should be capable of taking possession of it themselves, to apply a part of it for their maintenance and education. This bill being filed, an application is made to the Court to appoint a proper person to act, for the purpose of taking care of those children, and applying this fund for their maintenance. That the Court has jurisdiction with respect to the maintenance is unquestionable; it is a jurisdiction with respect to the income of the property, to take care of it for the benefit of the children, to apply it for the benefit of the children, as far as it may be beneficial for them that it should be so applied, and to accumulate any sur-

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plus, if any surplus there should be. The right, therefore, to act, upon this subject, is unquestionably independent of any other part of the case.

If Mr. Wellesley had not been of the description which is attributed to him by these proceedings; had he been a person not objectionable in himself, but in extreme poverty, and unable, therefore, to maintain his children, which has been the case in some instances which have come under the consideration of the Court, the Court, as in those instances, might have thought fit to allow, out of the income belonging to the infants, a sum of money for the purpose of the maintenance and education of those children; but, in all those cases, the Court has always thought fit to take on itself, and it was bound to take on itself the mode in which that allowance should be applied for their benefit, and therefore has put it under some control. Whether it has entrusted the father with the application, or whether it has thought fit to appoint other persons to see to the application, it has always been put under some sort of control.

It is said, that there is nothing from which this jurisdiction can be inferred as belonging to the Court, except the *dicta* that may be found in books, and the actual exercise of it for one hundred and fifty years by persons who have sat in the Court of Chancery. If we look back to the constitution of the government of this country, there are many things which we cannot ascertain. Will any of your Lordships tell me how there comes to be a House of Commons and a House of Lords? I cannot tell. I have taken much pains to investigate that subject, and I believe it is impossible to say whence it originated—whence it came, that that which, to all appearance, from early records and early history was a General

Council of Barons, came to be divided into two Houses of Parliament, a House of Lords and a House of Commons, the House of Commons elected and not summoned on any other ground. We know that it arose at a certain period, but how it then took place we do not know.

It is so with respect to many other jurisdictions. As to much of the jurisdiction of the Court of King's Bench, of the jurisdiction of the Court of Exchequer, your Lordships would be extremely puzzled to say how it originated: With respect to this jurisdiction of the Court of Chancery, I have had some experience on the subject in the character of one of the Justices of Wales, and at one time Chancellor of the bishopric of Durham. With respect to Wales, all the jurisdiction originated by an act of Henry VIII. That act gives jurisdiction to the Chancellor, and, as incident to their Courts of Chancery, all the Justices of Wales have constantly exercised this jurisdiction, with respect to wards in their court. I really cannot tell whence the Chancery of Durham originated; but, as Chancellor of Durham, I have exercised this jurisdiction, and nobody doubted the right to the jurisdiction.

These instances prove distinctly, that it is considered in the constitution of the government of this country, that all powers in the administration of justice, which are necessary in themselves, are vested in the Crown, vested in the Crown to be exercised by those ministers of the Crown to whom the jurisdiction has usually been delegated; and this jurisdiction must be taken to be delegated to the Court of Chancery, whenever there is a suit respecting property in that Court; and if there was a suit respecting property in the Court of Exchequer, as a Court of

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Equity, to take care of the property belonging to an infant, the Court of Exchequer would exercise that jurisdiction, as incident; that is, it would take care that the property which was to be administered under its direction, should be properly so administered.

It would be a very extraordinary decision to hold, as it has been argued, that, until this House, as a Court of superior jurisdiction, had positively decided on the jurisdiction, that that jurisdiction should be considered as not existing. It must previously exist from the supposition of the general administration of justice before this Court could entertain any judgment on the subject. It may be said, if the Court of Chancery exercised the jurisdiction where it has none, this Court may pronounce that it has no jurisdiction, but this Court cannot pronounce that it has jurisdiction, but because it has previously the jurisdiction. If it were necessary to go back into times long past, to examine the grounds on which every law is administered in this country, before it could be considered as legally administered, we should be involved in very great difficulties. But what has been the practice for a great number of years, has been held, not in this country alone, but in all countries, to be a ground for supposing that it was rightly done, on this supposition, that if it had been wrongfully done, it would not have been permitted to be continued.

Having said thus much on the question of jurisdiction, I will say very little on the rest of the case. The jurisdiction, I conceive, extends to the case of the person as far as is necessary for protection and education. The care of the person to protect from violence belongs to the Court of King's Bench, but

the care of the person with respect to education does not belong to the Court of King's Bench, and the Court of King's Bench disclaim any such right: therefore, as to the care and protection for the purpose of education, it belongs to this Court, which has exercised the jurisdiction. The Chancellor perhaps might have exercised it independent of the cause which has been instituted; but as incident to the cause that has been instituted, I apprehend there can be no doubt of the right to exercise the jurisdiction. If the jurisdiction exists upon the grounds on which the Court has thought fit to interfere with the care of the father in the management of his children, I would only refer to one passage in a letter, which Mr. Wellesley himself wrote to Mr. Pitman, the tutor of these children; and I would ask then whether any one of your Lordships can doubt as to the necessity of some control over the management of Mr. Wellesley with respect to his children. It is in a letter to Mr. Pitman, dated the 16th of November, 1824, in which he says, "there are certain things which ought to be let alone, a man and his children ought to be allowed to go to the devil their own way, if he pleases." Now, my Lords, a man who can so write to a person of the description of Mr. Pitman (for it is not a loosely written letter, to a loose person, to whom he might have expressed himself carelessly, but it is a letter written to Mr. Pitman, the tutor of his children) has, independent of any other consideration, declared himself to be an improper person to have the sole control and education of his children.

The order that has been made does not absolutely exclude him, because if Mr. Wellesley found that improper persons were proposed to have the care of his

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children he might, with great propriety, interpose, and the Court would attend to any objection he might make on that subject.

*The Lord Chancellor.*—He has proposed his own tutor, and that tutor has been appointed.

*Lord Redesdale.*—I was not aware of that. With respect to the immediate care he has proposed a proper person, and that person has been appointed, and he may control the conduct of any person who may be appointed to have the care of the children, and he has a right to apply to the Court if there should be any misconduct on their part, and I can have no doubt the Court would pay every attention, and ought to pay every attention, to any such representation.

Mr. Wellesley complains that there stands on the records of this Court, in the affidavits, much which he asserts is a libel upon his character. It is unfortunate that, when any question of this kind comes to be contested in family transactions, many things disagreeable to the feelings of the parties will be brought forward, and it would have been infinitely more prudent, in my humble opinion, if Mr. Wellesley had not carried the matter to this length, but contented himself with that which he would have been permitted to use, the interference with respect to the persons who might be appointed to the care of the children, and the interference with respect to the mode in which that care should be exercised. Mr. Wellesley has brought upon himself all that has passed on this occasion; it is very much, in my humble opinion, owing to himself.

Much has been said with respect to that part of the evidence which relates to the transactions in Italy. The learned Judge who pronounced this order appears, by the report of what he said, not to have

relied upon that evidence; but to have relied upon the evidence of that which subsequently happened as the foundation of his order. It seems to me that, in the argument of the counsel at the bar, they have thought that this case was to be used more for the purpose of throwing obloquy on the conduct of a Dr. Bulkeley, and of a Mr. Meara, and of another person, (I forget his name,) than for any other purpose. With respect to Dr. Bulkeley, it is not for me to say anything. Judging from the whole that appears in these affidavits, the question of truth or falsehood lies certainly between him and Mr. Wellesley; but I must take leave to observe that the subsequent unquestionable facts strongly confirm Dr. Bulkeley, and as strongly tend to invalidate what has fallen from Mr. Wellesley.

With respect to Mrs. Bligh being a person in the situation in which she stands, I cannot think that great reliance can be placed on what she has asserted in her affidavit; and, taking the whole evidence together, I think there can be no doubt that the order which has been made, if there was authority to make it, is justified by that evidence. Can any of your Lordships who has read the evidence, and read it with the utmost candour towards Mr. Wellesley and Mrs. Bligh, doubt that there ought to be some restraint? It has been asserted at the bar, that Mrs. Bligh has been carefully kept separate from these children? Can you doubt whether the separation has not been owing to the very circumstance of his apprehensions from these proceedings? Can you doubt, from the influence which it appears from these affidavits, Mrs. Bligh has over Mr. Wellesley, that if there was no control exercised by the Court upon this subject, Mrs. Bligh would be the person to have the

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care of these children, or at least to influence the manner in which they would be disposed of.

I feel for Mr. Wellesley, because I see that he is in chains—I see that Mr. Wellesley has unfortunately made a connexion which he is unable to dissolve, and which I believe, from many passages in the affidavits, at one time he would have been very happy to have been enabled to dissolve; but as it is, he has put himself in a situation in which, in my humble opinion, he cannot be considered as a freeman.

Under these impressions, I approve of the order which has been made, having no doubt whatever of the authority to make that order, and conceiving that if your Lordships were to hold that there was not authority, you would do the greatest possible mischief to the country—a mischief which must instantly be remedied by the legislature, for it never could be endured that the country should be in such a situation, that children, such as these are, particularly, should be in the power of the father to treat as he might think proper with respect to their education, the eldest child in this case being likely to be a peer of the realm.

Only consider to what extent this might go. It might happen that a person might form an improvident marriage. A lady who had high expectations, might marry a person of the lowest, and most profligate description, and her son might, after her death, be entitled to great property, and might also be a peer, the father being a person of the most abandoned description, of the worst education, the most improper person to have any care or direction of the management of that son; and is the doctrine to be endured that there does not exist in this country a jurisdiction to control the power of the father in such circumstances: I deny that the law ever considered that

he has such a power, it has always considered it as a trust. Look at all the elementary writings on the subject; they say that a father is entrusted with the care of the children; that he is entrusted with it for this reason, because, it is to be supposed, his natural affection would make him the most proper person to discharge that trust. Under this impression I humbly move your Lordships to affirm the Judgment of the Court below.

*Lord Manners.*—The argument of the noble and learned Lord who has discussed this case (concurring entirely, as I do, with all which he has stated) has rendered it unnecessary for me to enter into much discussion on any of the points that occur in this case.

This is an appeal against an order of the late Lord Chancellor, Lord Eldon, by which he declined to comply with the petition of the Appellant, Mr. Wellesley, which required, among other things, to have the children in his custody, instead of which, the noble and learned Lord directed a reference to the Master to report as to a proper person, with the exception of the Appellant, to have the care and the superintendence of the education of his children. This order of the noble and learned Lord is objected to by Mr. Wellesley, the Appellant, upon two grounds: first, that the Chancellor has not a jurisdiction in the Court of Chancery to separate the children, the wards of the Court, from their parent, while he is residing in this country; secondly, if there be such a jurisdiction, that, in the present instance, it has been improperly exercised.

With respect to the first question, I acknowledge I have not attempted to explore the origin, or to ascertain the commencement of the jurisdiction. If I had so done, I should have been anticipated in every

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thing which might have been said usefully upon the subject, by my noble and learned friend ; for it seems to me, indeed, abundantly sufficient for the purpose of this case, that this jurisdiction has been uniformly asserted and repeatedly exercised by successive chancellors for a period of more than a century. I have looked into the cases referred to on the subject, to discover if any chancellor hesitated, or has entertained a doubt as to this jurisdiction. I do not find, from the time of Lord Nottingham to the present day, that any doubt has been stated by the Court with respect to the existence of such a jurisdiction. It has, then, become the established jurisdiction of the Court ; it has become the practice of the Court, and as such, a part of the law of the land. Indeed, it is a strong confirmation of this jurisdiction, that, on a writ of *habeas corpus* being applied for by the father, to have the children restored to him, in the Court of King's Bench, that Court enquires whether they are wards of the Court of Chancery, and whether there are any proceedings in that Court respecting them. If the Court of King's Bench finds there are such proceedings, it declines to grant the writ. This would be a dereliction of their duty if no such jurisdiction exists ; this seems to be a strong judicial recognition of the existence of this jurisdiction, to be exercised by the Chancellor in the Court of Chancery. Upon that ground, therefore, I can entertain no doubt. There was an observation of Mr. Brougham on the subject, that the jurisdiction could not exist, because you could not ascertain the limits of it. That objection applies to every case where there is a discretion in the judge ; where the result of the facts is not a question of law, but a question of discretion. It is therefore impossible to say what are the limits of that jurisdiction ; every


case must depend upon its own circumstances. With respect to the jurisdiction, I should agree with Lord Thurlow, that it is too well established, to be open to question.

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Then it is contended that in the present instance, this jurisdiction has been improperly exercised. Now I admit, (for I have taken pains to read through all the affidavits, voluminous as they are,) that upon some facts it is utterly impossible to reconcile the affidavits. I do not, however, think on those facts, on which there are these contradictory statements in the affidavits, that those facts are material to the decision of this case. There is abundantly sufficient, in my opinion, independent of the disputed facts, to warrant the order that was pronounced by the noble Lord below. It is perfectly clear, for instance, that Mr. Wellesley was, at the time of the death of his wife, living in a state of adultery with Mrs. Bligh—that is perfectly clear; and from all that appears in the cause, that intercourse still continues. If so, to restore this little girl and her brothers to the care and custody of the parent, would be, in fact, to deliver them over to this abandoned woman. It is also perfectly clear, to my mind, that Mrs. Wellesley had intended to institute proceedings in the Ecclesiastical Court, to dissolve the marriage. That she intended to prosecute that, or some other suit, is manifest from her own letters, which I think have been properly read in the course of the discussion of this subject.

Now I state this, not for the purpose of insisting (for the case does not require such an opinion,) that the mere act of adultery, or the living in a state of adultery, on the part of the father, is sufficient to warrant the separation of the children from their

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parent: I do not state such to be the case. If that case should arise, then it will be time enough to give an opinion upon it. This is only one circumstance in the case, and I rely upon it principally for this purpose, to shew the reprobate character, and vicious habits of the Appellant. His unfeeling and cruel behaviour toward his wife, are also circumstances which tend strongly to disqualify him from being the guardian of his children. But I principally rely upon those facts which corroborate the other charges in the case, and which are much more pointed, and much more particularly applicable to the question now in dispute; namely, whether these children ought, or ought not to be restored to the father. The charge is, that he instructed, or encouraged them in the habit of profane swearing, perhaps the only vicious habit, which at the time when the order was pronounced, these children were capable of contracting; a most vicious habit, which he chooses at all times to represent as venial, and if the boy is in a passion, such as is perfectly allowable. Now this charge does not depend on the testimony of Dr. Bulkeley. With respect to Dr. Bulkeley, I will say a few words presently, but it does not depend on his testimony; it is distinctly proved by Mr. Pitman, whose veracity is not called in question; and that testimony of Mr. Pitman is corroborated in the strongest manner by the letters of Mr. Wellesley to his son, and to Mr. Pitman himself. Those facts stand perfectly clear in themselves, and are so established in point of proof, that it is impossible to entertain a doubt about them.

Then with respect to Dr. Bulkeley's evidence, I certainly do disapprove of some part of the evidence of Dr. Bulkeley; I think he has unnecessarily

come forward to disclose confidential and professional communications that have been made to him ; but with respect to his veracity, with respect to the truth of what he has sworn to ; I profess, in looking over the affidavits, I think those in support of his credit, far preponderate over those which impeach that testimony, and I think he stands entitled to credit in a court of justice. He corroborates the charge of its being the habit of the Appellant, in this case, Mr Wellesley, to instruct or encourage his children in profane swearing. That is an extremely vicious, and most dangerous habit to impress on children, especially with the authority of a father.

Now, supposing Mr. Wellesley not to have the parental right, and that we are to look to the Court of Chancery for the appointment of the guardian, I do not believe there is to be found in the community, a person less qualified for the office and the duties of it, than the Appellant ; it would be utterly impossible he could be appointed as a guardian by the Court. Suppose Mr. Wellesley had been a testamentary guardian, and led this vicious life, set this bad example, inculcated this bad habit of profane swearing upon the boys entrusted to his care, as testamentary guardian ; undoubtedly the Court would consider him as abusing his trust, as unfit to have the care and protection of the children, and would rescue them from the mischief and danger of so bad an example, and such vicious propensities.

I do not understand, in looking at the office of guardian, how to distinguish between the testamentary guardian, and the parent. The testamentary guardian deriving his title from the right of the parent, under the act of parliament, it is a continuation of the same trust, and whether it is exercised by the parent, or by the person delegated by him, is under the same

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control, and liable to the same jurisdiction. The Court certainly would regard the feelings of the parent; the Court would be anxious that the affection of the children should not be estranged from their parent; it is a most important duty imposed on the person who may have the care of the children, to impress that on their minds; but inasmuch as the Court cannot correct the vices of the parent, the Court is bound to protect the children against them. On that ground the noble Lord acted, and, I think, properly acted. If there be a jurisdiction, of which I entertain no doubt, I cannot suggest to myself a case which more imperiously calls on the Chancellor to interfere, and exercise that jurisdiction, than the present; to take the children away from the person who has a total disregard to their moral and religious principles, and who is setting such a dangerous and mischievous example to these young children.

*The Lord Chancellor.*—It is not necessary for me to say more, after what has been said by the two noble and learned Lords, than that I perfectly concur in their opinion on both the points, and in the conclusions which they have drawn.

We are of opinion it is not a case for costs.

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Judgment affirmed, without costs.

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THE KING - - - - - *Plaintiff in error.*

The Right Honourable CHARLES }  
 ANDERSON PELHAM, Lord } *Defendant in*  
 Yarborough - - - - - } *Error.\**

Upon a commission under the Great Seal, and an inquisition returned into and filed in the Petty Bag Office of the Court of Chancery, lands were seized into the king's hands as derelict by the sea. The lord of the adjoining manor, upon petition to the Lord Chancellor, having obtained leave to traverse the inquisition, filed his traverse in the Petty Bag, denying that the lands were *derelict*, and pleading that they were formed by alluvion, or gradual deposit of soil. The Attorney General, in his replication to this traverse, took issue upon the alleged fact of alluvion, and the Defendant joined issue. Upon the trial, a verdict was found for the Defendant, and afterwards, upon application of the Attorney General for a new trial, the Court ordered the facts proved to be stated in a special case; which being argued, a verdict for the Defendant was entered by direction of the Court.

A writ of error from this judgment, directly to the House of Lords, being brought by the Attorney General, on behalf of the crown; Held, that the House of Lords has jurisdiction to hear such writ of error; that it is not necessary to carry a writ of error first to the Exchequer Chamber, and that lands formed by alluvion, that is by gradual and imperceptible deposit, on the shore of the sea, belong to the lord of the adjoining manor, and not to the king, *Jure coronæ*.

A custom regulating the rights of the owners of all lands bordering on the sea, is so general, that it need not be pleaded.

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IN the 59 Geo. 3. a commission was issued under the great seal, appointing certain commissioners

\* See the report of this case, in the Court below, 3 B. and A. 94.

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therein named, and directing them to inquire whether there were any and what lands, and how many acres of land, in or adjoining or near to the several towns, parishes, or lordships therein mentioned, or any or either of them in the county of Lincoln, being land in time past covered with the water of the sea, and then by the sea left, and not covered with water, which to His Majesty in right of his crown, or in any other right, did belong and appertain, and which were concealed, subtracted, and unjustly withheld from him, and if so, by whom and how long, and who hath received and taken the issues and profits thereof from the time of such dereliction, or not covering, and to what amount, and in whose possession or tenure the said lands then were or remained, and how much they were worth by the year, according to the true value thereof; and all and singular the lands, which by the inquisition to be taken in that behalf, should be found to be concealed, subtracted, and unjustly withheld and detained from His Majesty, to enter upon and take and seize into the hands of His said Majesty.

In pursuance of this commission, an inquisition was taken, bearing date the 12th of November, in the same year, under the seals of three of the commissioners, named in the commission, and of twelve jurors, whereby they found (amongst other things) that there was a certain piece of land, being salt marsh, lying near or adjoining to the parish or lordship of North Cotes, in the county of Lincoln; and which piece of land was bounded towards the south and south-west by the sea-wall or sea-bank; of the lordship of North Cotes, and towards the north-west, by a part of the sea-wall or sea-bank, of certain lands, in the lordship

of Tetney, and on all other parts by the sea, and containing by estimation, four hundred and fifty-three acres, or thereabouts, and was of the value of four shillings for each acre, by the year, of lawful money of the United Kingdom, according to the true value thereof; and was in times past, covered with the water of the sea, but was then, and had been for several years past, *by the sea left*, and was not covered with water except at high tides, when the sea flowed to the sea-walls, or sea-banks: which said last mentioned piece of land, from the time of *such dereliction*, thitherto had been, and still was unoccupied; but the herbage thereof had been, from time to time, eaten and consumed by the cattle and sheep, belonging to divers tenants or occupiers of lands, situate within the parish or lordship of North Cotes; which said piece of land, (together with other pieces of land similarly described,) the commissioners had therefore taken, and caused to be seized into the hands of His Majesty.

On the 12th of December, in the same year, the commission and inquisition were returned into the Petty Bag Office of the Court of Chancery, and filed there.

In consequence of this inquisition, the Defendant in error presented a petition to the Lord Chancellor, stating the commission and inquisition, and his title to the manor of North Cotes, and praying for leave to traverse so much of the inquisition, and return thereof, as related to that part of the unembanked salt marsh land, which was situate within, or near adjoining to the parish, lordship, or manor, of North Cotes.

This petition was heard before the Vice Chancellor, and after argument an order was made, by which

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permission was granted to the Defendant to traverse so much of the inquisition, as related to the land in or adjoining to the manor of North Cotes; and similar permission was granted to the several lords of the manors, and owners of lands, in or adjoining to which the other pieces of land, mentioned in the inquisition, were situated.

In pursuance of this order, the Defendant in error in Easter Term, in the first year of His present Majesty's reign, filed his traverse in the Petty Bag Office, in the Court of Chancery, which, setting forth the commission and inquisition, and admitting that there was a piece of land, being salt marsh, bounded as in the inquisition is mentioned, and admitting the quantities and value thereof, as therein also mentioned, and that the said piece of land was then and there, and had been for several years, not covered with water, except at high tides, when the sea flowed to the sea-walls or sea-banks, and admitting that the herbage thereof had been, from time to time, eaten and consumed by the cattle and sheep, belonging to divers tenants or occupiers of land, situate within the parish or lordship of North Cotes, states, that from time, whereof the memory of man runneth not to the contrary, there hath been, and still is, a certain ancient manor, called or known by the name of the manor of North Thoresby cum North Cotes, situate within the parish of North Cotes aforesaid, in the county of Lincoln; and that the Defendant, long before the respective days of issuing the commission, and finding the inquisition, to wit, on the first day of July, 1758, was seized in his demesne as of fee, of and in the manor of North Thoresby cum North Cotes, and the demesne lands thereof; and that the same piece of land heretofore, to wit, on the first day

of January, 1300, and on divers other days and times between that day and the day of the finding of the inquisition, by the *slow, gradual, and imperceptible projection, alluvion, subsidence, and accretion of ooze, soil, sand, and matter, being slowly, gradually, and by imperceptible increase, in long time cast up, deposited, and settled, by and from the flux and reflux of the tide* and waves of the sea, in, upon, and against the outside and extremity of the demesne lands of the same manor, hath been formed, and hath settled, grown, and accrued upon and against, and unto the said demesne lands, of the same manor, and the same part and every portion thereof, when and as the same hath so there been formed, settled, grown, and accrued, hath thereupon and thereby, at those times respectively, in that behalf above mentioned, forthwith become and been, and from the same several times respectively, have and hath continued to be, and still are, and is part and parcel of the demesne lands of the manor; and the several owners and occupiers of the same manor, for the time being, during all the time aforesaid, until the time of the seizin of the Defendant as aforesaid, and the Defendant, during the time he hath been so as aforesaid seized of and in the said manor, from the time of the formation and accretion of the same piece of land, and every part thereof respectively, continually, until the time of the finding of the inquisition, respectively were and was seized in their and his demesne, as of fee, of and in the same piece of land, and every part thereof, when and as the same hath so been formed and accrued as aforesaid, as and for part and parcel of the demesne lands of the same manor. The Defendant's traverse concluded thus:—"Without this, "that the said piece of land, or any part or parcel

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“thereof, was by the sea left in manner and form as  
“in the inquisition is above supposed and found.”

The Attorney-General, in his replication, traversed part of the inducement to the Defendant's traverse as follows:—Without this that the said piece of land at the times in the said plea mentioned, by the slow, gradual, and imperceptible projection, alluvion, subsidence, and accretion of ooze, soil, sand, and other matter, being slowly, gradually, and by imperceptible increase, in long time cast up, deposited, and settled by and from the flux and reflux of the tide and waves of the sea, in, upon, and against the outside and extremity of the demesne lands of the same manor, hath been formed and hath settled, grown, and accrued upon and against and unto the said demesne lands of the same manor, in manner and form as the said Defendant hath above in his said plea alleged.

The Defendant in his rejoinder took issue upon that fact.

The replication of the Attorney-General then took issue on the Defendant's traverse, that the said piece of land was and still is by the sea left in manner and form as in the inquisition is above supposed and found; and thereupon, also, the Defendant joined issue.

The case came on to be tried at the Spring Assizes, 1823, for the County of Derby, (the venue having been changed from Lincolnshire to Derbyshire, by order of the Vice-Chancellor on the application of the crown,) by a special jury of the county, some of the special jurymen having previously had a view of the land in question, when a verdict was found for the Defendant.

The Attorney-General, on behalf of the Crown, having applied to the Court of King's Bench for a new trial, the Court directed the facts proved to be

stated in a special case for the opinion of the Court, which was accordingly done, and the case came on to be argued in Trinity Term, 1824; when, after argument, the Court were unanimously of opinion that the verdict was right, and that judgment should be, and it was accordingly entered for the Defendant thereon.

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A writ of error in Parliament was thereupon brought by the Attorney-General on behalf of the Crown, and the following was the error assigned:—

“ That it appears by the said record, that the land  
 “ therein described was and is land gained from the sea  
 “ by alluvion, and that in no part of the traverse filed  
 “ by the said Defendant to the inquisition in the said  
 “ record stated, nor in any other part of the said re-  
 “ cord doth the said Defendant state or allege any  
 “ custom or prescription, or other sufficient matter,  
 “ whereby the right and title of our said Lord the  
 “ King to land so gained, can by the law of the land  
 “ be barred or defeated; and that the said traverse  
 “ so filed by the said Defendant, and the matters  
 “ therein contained, are not sufficient in law to bar or  
 “ defeat the said right and title of our said Lord the  
 “ King to the land so gained by alluvion as aforesaid.”

The common error was also added.

For the Plaintiff in Error—*The Attorney General*  
 and *The Solicitor General*.

For the Defendant in Error—*Mr. Denman* and  
*Mr. Coleridge*.\*

\* The argument was, in substance, the same as in the Court below. There was a preliminary objection taken in the printed papers, and touched, but not prosecuted in the argument, on the behalf of the Defendant in Error, viz.: that the proceeding having been originally *ex parte*, and the judgment on the case stated not having been given in a *cause*, could not, according to the practice of the House, be the subject of a writ of error. Upon

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In the course of the argument the Lord Chancellor made the following observations:—

*The Lord Chancellor.*—Lord Hale most obviously interprets the expression “*secundum patriæ consuetudinem*,” to mean the custom of the district. With respect to actions against carriers, and so on, the common form of the declaration is, “according to the custom of the realm;” that is very analogous to the expression “*secundum consuetudinem patriæ*.”

*Patria* comprehends the whole country.

In the case of the Abbot of Ramsey,\* the following passage occurs in the judgment.

“*Quod secundum consuetudinem patriæ domini maneriorum prope mare adjacentium habebunt marettum et sabulonem per fluxus et refluxus maris.*”

Nothing can be more general than that.

The case of the Abbot of Ramsey is not the case of a gradual increase, nothing is said about gradual increase; it is alternate, up and down. That is a case which could not, according to the doctrine laid down

this question see, as to proceedings in lunacy, *Rocheport v. the Earl of Ely*, 6 B. P. C. 320, in *mandamus*, *Pinder v. Hearle*, 3 B. P. C. 505: in the case of an order made under the authority of an Act of Parliament, in a matter arising out of proceedings upon a writ of extent, *Wall v. the Attorney-General*, MSS. D. P. 1822; *Hoare v. Attorney-General*, MSS. D. P. 1824: in the case of an order made by the Court of Exchequer, in Ireland, upon one of its officers, *O'Neill v. Fitzgerald*, MSS. D. P. 1826. See also the stat. 14 Ed. 3. stat. 1. c. 5; 27 Eliz. c. 8; 31 Eliz. c. 1.

The House has no jurisdiction by way of error, or appeal against any order in bankruptcy, or generally upon any proceeding, unless it *arises in a cause*, the only exception is, in the case of a proceeding under a commission of charitable uses, which is warranted by ancient precedent.

\* Dyer, 326.

by Lord Hale, have been supported by prescription or custom, because it is not a case of gradual increase. It appears to be a case of occasional loss. It depends on a different principle.

In the judgment of the Court, in the case of *the King v. The Bishop of Winchester*,\* the authority of Staunford is cited.

No man shall traverse the office, unless he makes himself a title; and if he cannot prove his title to be true after he has set it out upon the record, although he may be able to prove his traverse to be true, yet his traverse will not serve him.—He cannot traverse without a title, and if he has no title, his traverse falls to the ground.

In the case of *the King v. the Bishop of Winchester*, the king's title had not been found by matter of record. That is a distinction: here the king's title is found by matter of record.—The subject on suggestion, of his having a title, is allowed to come in and traverse the inquisition. If he has no title at all, the king's original title stands. There are cases of that description. A party may be entitled to appear and contend against the king's title, by having a title of his own arising from some cause: that is a matter of investigation. If it turns out that he has no title, he is reduced to his original state.

The right of the Plaintiff in error is pleaded to be in consequence of slow and gradual accretion of the land; and they have traversed that plea.

It is traversed in substance, and in effect.

The king has, by his prerogative, the soil between high and low water-mark; it is an incident to his prerogative.

Lord Hale, in the case of the *Abbot of Peter-*

\* Staun. Prer. tit. Traverse, c. 20. 63.

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*borough*, observes, that there a custom was laid, and he relies not barely upon the case without it.

There is an allegation in the case of *Sutton Marsh*,\* precisely in the same terms as in this. There is no declaration of the district, to which the custom applies. It appears to be laid down generally, as the custom of all manors bordering on the sea. Reasoning from what appears on the *Sutton* case, the conclusion is, that it was meant to be laid as the custom of all manors bordering on the sea, without defining to what manor it particularly applied. There appears to be no room for a misapprehension as to that record, to which I am now referring.

I propose to put this question to the learned judges. "A. is seized in his demesne as of fee of the manor of N., and of the demesne lands thereof, which said demesne lands were formerly bounded on one side by the sea. A certain piece of land consisting of about four hundred and fifty acres, by the slow, gradual, and imperceptible projection, alluvion, subsidence, and accretion of ooze, soil, sand, and matter slowly, gradually, and by imperceptible increase, in long time cast up, deposited, and settled by and from the flux and reflux of the tide, and waves of the sea, in, upon, and against the outside and extremity of the said demesne lands, hath been formed, and hath settled, grown, and accrued upon, and against, and unto the said demesne lands. Does such piece of land so formed, settled, and accrued as aforesaid, belong to the crown, or to A., the owner of the said demesne lands. There is no local custom on the subject."

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\* The King v. Oldsworth. Hale de Jure Maris, pp. 30, 31. 12th Car. 1. p. 14.

The question was handed to Lord Chief Justice Best, and the further consideration was postponed.

*Lord Chief Justice Best*—(After stating the question proposed for the opinion of the Judges, proceeded as follows):

The judges have desired me to state their opinion, that land gradually and imperceptibly added to the demesne lands of a manor, as stated in the introduction to your question does not belong to the Crown, but to the owner of the demesne land. All the writers on the law of England agree in this, that as the king is lord of the sea, that flows around our coasts, and also owner of all the land to which no individual has acquired a right by occupation and improvement, the soil that was once covered by the sea belongs to him.

But this right of the sovereign might, in particular places, or under circumstances in all places near the sea, be transferred to certain of his subjects by law. A law giving such rights, may be presumed from either a local or general custom, such custom being reasonable, and proved to have existed from time immemorial. Such as claim under the former, must plead it, and establish their pleas by proof of the existence of such a custom from time immemorial. General customs were, in ancient times, stated in the pleadings of those who claimed under them; as the custom of merchants, the customs of the realm, with reference to inn-keepers and carriers, and others of the same description. But it has not been usual for a long time to allude to such customs in the pleadings, because no proof is required of their existence they are considered as adopted into the common law, and as such are recognised by the Judges without any evidence. These are called customs because they only apply to particular descriptions of persons, and do not affect all the

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subjects of the realm; but if they govern all persons belonging to the classes to which they relate, they are to be considered as public laws: as an act of parliament, applicable to all merchants, or to the whole body of the clergy, is to be regarded by the Judges as a public act.

If there is a custom regulating the rights of the owners of all lands bordering on the sea, it is so general a custom as need not be set out in the pleadings, or proved by evidence, but will be taken notice of by the Judges, as part of the common law. We think there is a custom by which lands from which the sea is gradually and imperceptibly removed by the alluvion of soil becomes the property of the person to whose land it is attached, although it has been the *fundus maris*, and as such the property of the king. Such a custom is reasonable as regards the rights of the king, and the subjects claiming under it, beneficial to the public, and its existence is established by satisfactory legal evidence.

There is a great difference between land formed by alluvion and derelict land. Land formed by alluvion must become useful soil by degrees, too slow to be perceived. What is deposited by one tide will not be so transient as to be removed by the next. An embankment of a sufficient consistency and height to keep out the sea must be formed imperceptibly. The sea frequently retires suddenly, and leaves a large space of land uncovered. When the authorities relative to these subjects are considered, this difference will be found to make a material difference in the law which applies to derelict lands, and to such as are formed by alluvion. Unless trodden by cattle, many years must pass away before lands formed by alluvion would be hard enough or sufficiently wide to be used beneficially by any one but the owner of the lands adjoining. As soon as alluvial lands rise above the

water, the cattle from the adjoining lands will give them consistency by treading on them, and prepare them for grass or agriculture by the manure which they will drop on them. When they are but a yard wide, the owner of the adjoining lands may render them productive. Thus lands, which are of no use to the king, will be useful to the owner of the adjoining lands; and he will acquire a title to them on the same principle that all titles to lands have been acquired by individuals, viz., by occupation and improvement.

*Locke*, in a passage in his *Treatise on Government*, in which he describes the grounds of the exclusive right of property, says, "God and man's reason commanded him to subdue the earth, that is, to improve it for the benefit of life, and thereon lay out something upon it that was his own, his labour. He that, in obedience to that command, subdued, tilled, and sowed any part of it, thereby annexed to it something that was his property, which another had no title to, nor could without injury take from him." This passage proves the reasonableness of the custom that assigns lands gained by alluvion to the owner of the lands adjoining. The reasonableness is further proved by this; that the land so gained is a compensation for the expense of an embankment, and for losses which frequently happen from inundation to the owners of lands near the sea.

This custom is beneficial to the public. Much land, which would remain for years, perhaps for ever, barren, is, in consequence of this custom rendered productive as soon as it is formed. The sea being gradually and imperceptibly forced back, the land formed by alluvion, will become of a size proper for cultivation and use, and in the mean time the owner of the

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adjoining lands will have acquired a title to it by improving it. The original deposit constitutes not a tenth part of its value, the other nine-tenths are created by the labour of the person who has occupied it, and, in the words of Locke, the fruits of his labour cannot, without injury, be taken from him. The existence of this custom is established by legal evidence. In Bracton \* there is this passage: "*Item quod per alluvionem agro tuo flumen adjecit jure gentium tibi acquiritur: est autem alluvio latens incrementum et per alluvionem adjici dicitur quod ita paulatim adjicitur quod intelligere non possis quo momento temporis adjiciatur. Si autem non sit latens incrementum, imo apparens contrarium erit.*"

In a treatise, which is published as the work of Lord Hale, treating of this passage, it is said that "Bracton follows in this the civil law writers, and yet, even according to this, the common law doth regularly hold between parties; but it is doubtful in case of an arm of the sea." It is true that Bracton follows the civil law, for the passage above quoted is to be found in the same words in the Institute; † but Bracton, by inserting this passage in his book on the laws and customs of England, presents it to us as part of those laws and customs. Lord Hale admits, that it is the law of England in cases between subject and subject; and it would be difficult to find a reason why the same question between the crown and a subject, should not be decided by the same rule. Bracton wrote on the law of England, and the situation that he filled, namely, that of Chief Justice, in the reign of Henry 3, gives great authority to his writings. Lord Hale, in his history of the common law, ‡ says that it was much

\* Book 2. cap. 2.

† Lib. 2. tit. i. s. 18.

‡ Cap. 7.

improved in the time of Bracton. This improvement was made, by incorporating much of the civil law into the common law.

We know that many of the maxims of the common law, borrowed from the civil law, are still quoted in the language of the civil law. Notwithstanding the clamour raised by our ancestors for the restoration of the laws of Edward the Confessor, I believe that these, and all the other Saxon and Norman customs, would not have been adequate to form a system of law sufficient for the state of society in the times of Henry III. Both courts of justice and law writers were obliged to adopt such of the rules of the digest, as were not inconsistent with our principles of jurisprudence. Wherever Bracton got his law from, Lord Chief Baron Parker,\* says, "as to the authority of Bracton, to be sure many things are now altered, but there is no colour to say that it was not law at that time. There are many things that have never been altered, and are now law. The laws must change with the state of things to which they relate; but according to Chief Baron Parker, the rules to be found in Bracton, are good now in all cases to which those rules are applicable." But the authority of Bracton has been confirmed by modern writers, and by all the decided cases that are to be found in the books. The same doctrine that Bracton lays down, is to be found in Rolle's Abridgement,† in Comyn's Digest,‡ in Calles,§ and in Blackstone's Commentaries.||

In the case of the Abbot of Peterborough,¶ it was

\* Fortescue, 406.

† Tit. Prerogative. *En le Mere*, p. 168 and seq. pl. 3. 9. 12.

‡ Title Prerogative, D. 62. § Broderip's edition, p. 62.

|| Vol. ii. p. 262.

¶ Hale *de Juré Maris*, in Harg. Law Tracts, p. 29.

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former occasions, it appears to me, after reading the finding of the Jury, that the opinion of the Judges is correct. I, therefore, concur in the opinion which the Lord Chief Justice has expressed,

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Judgment affirmed.

# REPORTS OF CASES

HEARD IN THE

HOUSE OF LORDS,

UPON APPEALS AND WRITS OF ERROR,

*And decided during the Session 1828.*

9th GEO. IV.

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ENGLAND.

(COURT OF EXCHEQUER.)

The Wardens and Commonalty of the }  
 Mystery of MERCERS of the City of } *Appellants.*  
 London - - - - - }

HIS MAJESTY'S ATTORNEY GENERAL *Respondent.*

A, by a deed executed in 1616, for a nominal consideration, conveyed to certain persons therein named, certain premises which were then let upon lease for forty-one years, at a rent of 150*l*. By another deed of the same date, reciting, among other purposes, a desire to relieve the poor of the Mystery of Mercers, of which the grantor was free, and the better to manifest his love and affection towards his brethren, the free-men of the said company, it was declared that the grant of the premises comprised in the former deed, and of the rent of 150*l*. reserved upon the lease, was made upon trust as to the premises, and the rent reserved, and all future rents and profits; that the grantees should receive and pay the monies arising therefrom to the Wardens of the Mystery of Mercers of the city of London, and their successors, and that the said Wardens and Commonalty should dispose of the monies to the uses therein mentioned. The schedule annexed to the deed then

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enumerated various charitable objects to which the money was to be applied, among which was a donation to poor brethren of the Mercers' Company. These donations amounted altogether to 140*l.* 11*s.*, leaving a sum of 9*s.* of the reserved rent of 150*l.* unapplied in the hands of the Mercers' Company. By improvements of and additions to the estate in consequence of an act of inclosure, the rent increased to a sum of 1,000*l.* a year, at which rent the premises were let in 1817: of this increased rent the Mercers applied 521*l.* 2*s.* in various payments according to the trusts; the residue of the rents of the estate they had for many years carried to the general account of the company, and applied them to their own use.

Upon an information filed to regulate the charity, held in the Court below, and on appeal, that the Mercers' Company were trustees of the rents and augmented rents, and that the surplus, after answering the payments directed by the deed, were applicable to such and the same purposes as directed by the deed, without prejudice to the question how far the Mercers' Company were intitled to share in the increased rents, with reference to their share of the original rent of 150*l.*

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**BY** indenture of bargain and sale, dated the 17th January, 1616, and made between Sir Thomas Bennett, knight, citizen and alderman of the city of London, of the one part; and Thomas Bennett, the younger, citizen, and alderman Rowland Backhouse, and eighteen others, citizens and mercers, of the other part; the said Sir Thomas Bennett, in consideration of twelve pence, and other good considerations, granted, bargained, and sold to the said parties of the second part, the rectory and church of Kirton, in the county of Lincoln, and the advowson and right of patronage of the vicarage of Kirton, late being parcel of the possessions of the monastery of Buckland, in the county of Somerset; and all the messuages, lands, tithes, and ecclesiastical dues and payments thereto belonging, which premises were by letters patent dated the 8th April, 6 James I., granted to Francis

Phillips and Richard Moore, and the yearly rent of 150*l.* reserved upon a lease of the said premises, dated on or about the 12th July, 14 James I., made by the said Sir Thomas Bennett to George Skelton, for the term of forty-one years, to hold to the said parties of the second part, and their heirs, yielding and paying to the king and his successors the rent of 29*l.* yearly reserved by the said letters patent.

By another indenture of the same date, and made between the said Sir Thomas Bennett, described as being the third son of Thomas Bennett, late of Clapcott, near Wallingford, in the county of Berks, deceased, of the first part; the said Thomas Bennett, the younger, Rowland Backhouse, and eighteen others, of the second part; the wardens and commonalty of the Mystery of Mercers, of the third part; and the mayor, burgesses and commonalty of the borough of Wallingford, of the fourth part; after reciting the before-mentioned deed, and also reciting that the said Sir Thomas Bennett, being incited to works of charity, was desirous to leave some memorial of his thankfulness to God, to be continued for ever, towards the relieving and maintenance of the poor of the said borough of Wallingford, being near the place where he was born, and of the poor within the city of London, where he then dwelt; and of the poor of the Mystery of Mercers, of which he was free; and the better to manifest his love and affection towards his brethren, the freemen of the said company, it was testified and declared, by the parties thereto, that the grant of the said rectory and advowson, and of the messuages, lands, tithes, and ecclesiastical dues thereto belonging, and of the said rent of 150*l.*, was made by the said Sir Thomas Bennett to the parties of the second part, upon the trusts and limitations,

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and for the intents and purposes expressed and declared by a schedule thereto annexed; and the several parties covenanted with each other well and truly to perform the said trusts on their parts to be performed. The schedule annexed to the deed, after stating that it contained the several trusts and limitations which were from time to time thereafter to be performed, touching the rectory and church of Kirton, and the advowson and other the premises and things specified in the last stated indenture, and touching the yearly rent of 150*l.* reserved upon a lease theretofore made of the same, by Sir Thomas Bennett, unto George Skelton, for the term of forty-one years, from Lady-day then next coming, and touching all other rents, issues, and profits of the same premises, directs (amongst other things) that the parties of the second part should permit the said Sir Thomas Bennett to receive the rents until Lady-day then next, and should from thenceforth receive the said yearly rent of 150*l.* and all other rents and issues thereof, and yearly pay and deliver the monies arising thereupon to the wardens of the Mystery of Mercers of the city of London, and their successors, or such one of them as the said company should appoint and be answerable for; and that the said wardens and commonalty should, from the said Lady-day, dispose of all the said monies so from time to time to be paid and delivered as aforesaid, to the uses following:—viz. to the king for the fee-farm rent reserved, by the letters patent before-mentioned, the sum of 29*l.* yearly; and to the receiver for two half-yearly acquittances, 1*s.*; to the mayor and burgesses and commonalty of Wallingford, to be paid half-yearly, and to be distributed by them among fifteen of the most poor and aged sort of men and women of the said borough town, in the manner

therein mentioned, the sum of 20*l.*; to four poor brethren of the company of Mercers, such as should have their freedom by service or patrimony, being then decayed in their estate, 5*l.* a-piece yearly, as long as they should live and be of good behaviour; the vacancies to be supplied by the said company upon their quarter days, amounting together to the sum of 20*l.*: for redeeming twelve or more prisoners, yearly, lying for debt in the two Compters and Ludgate, such as might be redeemed for 40*s.* or under, and for half or less if they could of the debt due, so far as the sum of 24*l.* in every year would extend: for clothing with hose, shoes, shirts, and such like, poor and naked men, women, and children, wandering in the streets of London, and that have no dwelling, to be bestowed at the discretion of the said wardens, or such one of them as the said company should appoint, the sum of 14*l.*: for the relief of poor children in Christ's Hospital, in London, to be paid to the masters and governors, the sum of 20*l.*; for the charge of a dinner for the wardens, assistants, and livery of the said company, at their hall on St. Andrew's day, the sum of 20*l.*; to the wardens appointed, for their pains in disposing of the said monies, the sum of 1*l.*; to the clerk of the company for his attendance, and for providing and keeping a book, yearly, of the said distributions, and making of acquittances, the sum of 1*l.*; and to the beadle of the company for his attendance in the distributions, the sum of 10*s.* The schedule then contained directions, that when the said trustees should be reduced to eight, the survivors should convey the premises to twenty others, being freemen of the Mystery of Mercers, and their heirs, upon the trusts aforesaid. The schedule also contained a further provision, that if it should happen

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that the rectory of Kirton, and other the premises, should at any time be lawfully evicted, or that by the alteration of times, the rents and profits thereof should so much decay and fall, that the good uses above mentioned should not be maintained therewith, in such case the wardens and commonalty should not be charged with any further payments than the said rectory and other the premises should in true and just value amount to; and it should be lawful for the company to make a proportionable abatement of the monies before limited to the said several uses, answerable to such decay or fall of the rents thereof, as should so happen.

The payments by the schedule provided, to be made out of the rent of 150*l.* being the income of the premises at the time of the grant, amounted to the sum of 149*l.* 11*s.*

New trustees were from time to time chosen of the said rectory, and other property and conveyances thereof from time to time made to such new trustees, who from time to time paid over the rents and profits of the rectory to the wardens and commonalty of the Mystery of Mercers, in order that they might distribute the same according to the trusts of the deed before-mentioned and the schedule thereto.

In the year 1772 an act of parliament was passed, intituled "an act for dividing and inclosing the Common Fen and certain other commonable places and open fields within the parish of Kirton, in the parts of Holland, in the county of Lincoln." The commissioners under that act by their award, dated on or about the 10th of May, 1773, allotted to the company of Mercers in lieu of all the tithes, both great and small, and all ecclesiastical dues and payments arising and belonging to the company upon and out of all or any

of the lands in the parish of Kirton, and upon the Common Fen and other places directed to be inclosed, three parcels of land lying in the High or Great Fen, in the inclosure called Kirton Inclosure, in the said parish of Kirton, containing respectively 317a. 1r. 29p., 226a. 3r. 23p., and 48a. 1r. 12p., and one parcel of land lying in the inclosure called Sutterton Inclosure, in the parish of Sutterton, containing 3r. 3p., making the whole quantity of land allotted 593a. 1r. 27p.

By a lease dated on the 22d of June, 1773, after reciting the particular allotments from the commissioners' award as before stated, and also reciting that the company were also possessed of a messuage or cottage and 2a. and 1r. by estimation, of pasture land thereto belonging, and also of 3r. and 13p. by measurement, then inclosed, in the parish of Kirton, and of 2a. by estimation of pasture formerly inclosed in the parish of Sutterton, and that all such lands and allotments contained together by measure and estimation 598a. 2r.; and also reciting that an estimate had been made of the expense of building a substantial messuage, barns, stables, and brewhouse, and other proper houses and buildings in some part of the premises, amounting to the sum of 1,215*l.* 17*s.* 1*d.*, and a like estimate of the expense of fencing and dividing the allotments, amounting to the sum of 1,149*l.* 6*s.* 5*d.*, and that one William Watson had agreed with the company for a lease of the premises, and to expend the said sums of money for the purposes aforesaid; the company demised all the said premises to William Watson for sixty-one years, from Lady-day then last, at the yearly rent of 315*l.*, and the lessee covenanted to expend the before mentioned sums respectively in

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erecting the buildings, and in fencing the allotments within the three first years of the term.

The covenant had been duly performed by William Watson, at an expense exceeding the stipulated sums by 700*l.*, and continued in the possession of the premises till the time of his death, upon which event his son, William Watson the younger, became intitled to the lease, and finding himself unable to carry on the farm, agreed with the company to surrender the lease to them upon having an annuity of 400*l.* secured to him for the remainder of the term of sixty-one years, and the agreement was carried into effect by a deed of surrender, dated on the 1st of March, 1816.

A new lease, dated the 7th of October, 1817, was afterwards granted to Samuel Everard, the present tenant, for twenty-one years and a half, from Lady-day 1816, at the rent of a pepper-corn for the first half-year, and of 1,000*l.* per annum for the remaining twenty-one years, and these terms were fixed in consideration of the tenant agreeing to lay out 700*l.* in repairing and improving the premises.

The payments specified in the schedule annexed to the indenture before stated, were not increased by the company, but such payments were from time to time regularly made, except as to the sum allotted to Christ's Hospital, which was purchased by the Appellants, and also to the sum allotted to the Appellants for a dinner on St. Andrew's day, which had for some years been discontinued, by reason of the surplus produce of the charity estate having been carried to the company's general funds. The sum allotted for the discharge of poor debtors had been frequently unapplied, in consequence of the restriction as to the amount, but the unapplied arrears had been duly

brought to account; and from time to time invested in the funds; and in the month of August, 1808, a sum of 402*l.* 17*s.* 2*d.* three per cent. consolidated Bank Annuities was purchased with 273*l.* 8*s.* 10*d.* arising from such arrears; and in the month of February, 1818, a further sum of 397*l.* 2*s.* 10*d.* three per cent. consolidated Bank Annuities was purchased with 320*l.* 3*s.* 11*d.* out of such arrears, making in the whole the sum of 800*l.* three per cent. consolidated Bank Annuities, and the dividends thereof, amounting to 24*l.* per annum, were carried to the account of the prisoners; and at an audit of the accounts of the charity on the 11th of October, 1820, there was a balance in the hands of the company of 149*l.* 1*l.* 11*d.*

In the year 1818, upon a report made by a committee to the court of assistants, that the small sums directed to be appropriated to the release of debtors, under the indenture secondly stated, and the schedule thereunto, were not sufficient, from the great change in the value of money, to attain the object of the donor in the release of deserving debtors,—It was resolved by the court that the masters and wardens of the Company should be authorized in future to apply the charity annually as they should see best, so as to release the greatest practicable number of deserving debtors, and that in consequence of this resolution the sums appropriated to each case had been extended where necessary, to 3*l.*

The annuity of 20*l.* a year given to Christ's Hospital by Sir Thomas Bennett, was purchased by the Company of Mercers in the year 1811, under the authority of the act made and passed for the redemption of the land tax.

The sums actually paid by the Company from the

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rent of the estate and premises were as follows; the annuity of 400*l.* to William Watson. The rent of 29*l.* reserved by the aforesaid letters patent and now paid to a purchaser from the Crown, and 20*l.* to the corporation of Wallingford; 5*l.* each to four poor brethren of the company appointed for life at a general court, amounting together to 20*l.* The prisoners in the two Compters and Ludgate, 24*l.* To the Renter Warden, to be applied by him, at his discretion, in clothing or otherwise relieving poor and distressed objects in the city of London, 14*l.* To the Renter Warden, 1*l.* To the clerk, 1*l.* To the beadle, 10*s.* For the annual insurance of the premises from fire, 11*l.* 12*s.*; which amounted in the whole to the sum of 521*l.* 2*s.* The residue of the rents of the estate had been for many years carried to the general account of the company, and had been applied by them to their own use and benefit.

These facts coming to the knowledge of the Commissioners, appointed under the statute 59 Geo. 3. c. 21, in the course of their enquiry, and it appearing to them that the Appellants were not entitled to retain such surplus for their own use, but that the whole of the rents ought to be applied to the purposes specified by the donor, they certified the particulars to the Attorney General, who thereupon filed an information in the Court of Exchequer against the Appellants and their trustees, stating the above circumstances, and praying that it might be declared that the Appellants were mere trustees for the distribution of the rents and profits of the estate, and ought to apply the whole of such rents and profits, as well as the dividends of the stock which had been purchased with a part of that fund, to the purposes prescribed by the donor, or some similar thereto, or to such other cha-

ritable purposes as His Majesty or the court should direct; and that they might be decreed to account for all the surplus rents which they had received, so long back as the court should think proper; and to pay what upon such account should appear to be due from them; and that it might be referred to a Master to approve of a scheme for the due application of such arrears, as well as of the future rents of the estate and dividends arising from the stock.

To this information the Appellants and trustees put in their answer, admitting the above facts; and the answer having been replied to, the cause came on to be heard before the Lord Chief Baron of the Exchequer, on the 27th of April, 1826, when the deeds by which the charity was founded having been produced and read in evidence, the cause stood for judgment, and on the 30th of May following, the Lord Chief Baron pronounced his decree, whereby it was declared that the Appellants were trustees of the rents, and of the augmented rents of the estates in the pleadings mentioned, and that the surplus rents, after answering the several payments directed to be made by the said deed of the 17th of January, 1616, are applicable to such and the same purposes as Sir Thomas Bennett has pointed out and directed the rents of such estate to be applied to, by the aforesaid deed of the 17th of January, 1616, without prejudice nevertheless to the question, how far the Appellants were entitled to partake of or share in the said increased or augmented rents, with reference to their share or benefit in the said original rent of 150*l.*, given to the Appellants by the deed of the 17th of January, 1616, and the decree directed accounts of the rents to be taken accordingly.

From this decree the appeal was presented.

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For the Appellants—*Mr. Bickersteth* and *Mr. Monro*.

For the Respondent—*The Attorney General* and *Mr. Pemberton*.

For the Appellants it was argued—That the donor had given the estate absolutely in use to the Appellants, and by the declaration of trust he had imposed on them the obligation of making certain specific annual payments out of the rents, which at the time of the gift did not amount to the annual produce of the estates; that there was an excess, and the amount of the excess was not material,\* therefore, instead of there being any ground of implication that the donor intended to dedicate the whole usufruct of the land to charitable purposes, on the contrary, the direct conclusion of the law is, that there was no such intention, and that a Court of Equity cannot imply a further intention, because the subject relates to public charity: that the Appellants were the express objects of the donor's regard; and as one of the purposes he had in view in making the gift, is declared to be to manifest his love and affection to his brethren, the Freemen of the Mercers' Company, it might be reasonably concluded that he intended to effect this purpose, by giving to the Appellants the surplus rents which should remain after the purposes particularly specified were answered: that in conferring the trust, the donor made the Appellants liable to responsibilities in respect of the rent reserved to the Crown and otherwise, and must therefore be understood to have intended the Appellants to receive any benefit which might remain after they had fully performed the

\* *Mocatta v. Lonsuda*.

trusts particularly declared ;\* and that length of time, although it was not an absolute limitation in the case of a charity, was nevertheless a circumstance to be considered.†

For the Respondents it was argued—That upon the whole frame of the deeds by which the property in question was vested in trustees, and the trusts thereof declared, it was manifest that the Appellants were intended to receive the whole of the rents as trustees for the purpose of distribution amongst the objects of the charity, and were not intended to take the estate as beneficial owners, subject to certain specific charges in favour of the charity.

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*The Lord Chancellor.*—(After stating the substance of the deed and schedule.) 16th July.

This property, which was at the period in question of the annual value of about 150*l.*, is at present of a value greatly exceeding that amount, and the question is, to whom the surplus rent belongs. The Mercers' Company contend that, according to the terms of this trust, they are entitled to the surplus rent, and on the other side it is contended, on the part of the Attorney General, who has filed this information, that the surplus rents, the increased rents, are to be applied to charitable purposes, similar to those designated in this schedule. In looking at the terms of this trust, your Lordships will find that the donor adverts, not merely to the standing rent of 150*l.* a year, but he looks forward to a possible alteration in the rent. The trustees are directed to pay over to the Mercers' Company all the rents which shall from time to time accrue ;

\* *Att. Gen. v. Corp. of Bristol*, 2 Jac. and W. 294.

† Per Lord Holt in *The Att. Gen. v. Coventry*, cit. 3 Mad. 353.

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and then it is directed that they shall receive the said yearly rent of 150*l.*, and all other the rents, issues, and profits thereof, from thenceforth to grow due and payable, and that the monies thereof arising, shall yearly be delivered to the Mercers' Company, so that the 150*l.* a year during the continuation of that lease is to be paid over by the trustees to the Mercers' Company; the future rents, however large they may be, are from time to time to be paid over to the Mercers' Company, and the direction is that the Mercers' Company, yearly and for ever pay and dispose of all the said monies, so from time to time to be paid and delivered as aforesaid." So that they are to receive the rents, whatever may be the amount of those rents, from time to time, and they are to pay over those rents, whatever their amount may be, to the purposes specially pointed out in this schedule. Therefore, upon the fair and obvious construction of that instrument, up to the point to which I have directed your attention, it appears that all the rents, however large, were to be applied to the purposes of those trusts.

But an argument has been raised out of the circumstance, that in the application of the first 150*l.*, 149*l.* 11*s.* only is appropriated, that there is a surplus of 9*s.*, and that that surplus belongs to the trustees, being unappropriated, which is therefore evidence to shew that it was the intention of the donor that whatever surplus rents at any future period might arise, it was not intended that those surplus rents should be applied to the purposes designated in the deed the special and particular purposes, but that they should become the absolute property of the Mercers' Company.

The case of the *Attorney General v. The Mayor and Corporation of Bristol*,\* was referred to for the

\* 2 J. and W. 294.

purpose of establishing this position; now the only principle established, or rather confirmed by that case, was, that where there is a surplus under circumstances similar to the present, that is, where there is an annual sum granted, and a part of that annual sum only is appropriated to special objects, and there is a residue which the trustees hold, that is evidence of the intention of the donor, that the surplus rent should belong to the persons to whom this property is in the first instance conveyed, but it is only evidence of the intention; it is liable to be repelled by any other evidence arising out of the instrument upon which that fact appears. It is quite obvious that if it is made use of merely as evidence of the intention of the donor, something must depend upon the amount of the sum; and surely no very strong evidence of intention can arise out of an instrument of this kind where it appears that the whole sum at that period amounted to 150*l.* a year, which is applied to a great number of special objects, and that the only balance remaining unappropriated is the fractional sum of 9*s.* No very strong evidence of intention can arise from a circumstance of that description, that it was the intention of the donor that any surplus funds at any future time, however large, should become the property of the Mercers' Company. Whatever slight inference of intention may arise from the omission to appropriate that small fractional sum, is repelled by the very strong terms in the former part of the deed, in which it is expressed, not only that the existing rent of 150*l.* a year, but all the rents should be received by the trustees and handed over to the Mercers' Company; and the Mercers' Company are directed to apply not the present rents only, but all the rents to the purposes of the will. That direction is so specific

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as to overrule any inference arising from the small extra fractional sum not being appropriated.

It was stated by the counsel at the bar, in arguing this case, that one object of the grant was, the love and affection Sir William Bennett bore to the Mercers' Company; and that it did not sufficiently appear by looking at this instrument, that the donor had, by the special purposes pointed out in the schedule, indicated any intention of providing beneficially for the Mercers' Company; that, therefore, it was fair to assume that he meant them to profit in some way from the increase of the rent. But you will find, by referring to the objects pointed out in this instrument, that they are all specially provided for in the particular appropriations mentioned in the schedule. The objects are these: "For the relieving and maintenance of the poor of the borough or town of Wallingford, being near unto the place where the donor was born; and of the poor within the city of London, where he hath been brought up, and doth now inhabit and dwell; and of the poor of the Mystery of the Mercers of the same city of London, of which company he is free; and the better to manifest his love and affection towards his brethren, the freemen of the same company." Now on looking into the schedule, you will find all those objects provided for: first there is "to the mayor, burgesses, and commonalty of the said borough or town of Wallingford, to be disposed of in manner therein mentioned, 20*l.* a year." So that the first object is provided for; namely, his regard for the inhabitants of Wallingford. "To four poor brethren of the Company of Mercers, the yearly sum of 20*l.*, that is to say, 5*l.* a-piece;" Another object intended specially to be provided for: "For redeeming twelve

persons lying for debt in the prisons of London, called the two Compters and Ludgate, 24*l.*, to be distributed in manner therein mentioned; and for clothing with hose, shoes, shirts, and such like, of poor and naked men, women, and children, wandering in the streets of the city of London, and that have no dwelling to be bestowed as therein mentioned, 14*l.* a year." That is another object specially provided for; then "For the charges of a dinner to be provided for the wardens, assistants, and livery of the Mercers' Company, 20*l.* a year." That is to shew his regard to the company of which he was a member. There are other sums, to which it is unnecessary for me to direct your attention; but you will find that he provides specially in this schedule for the different objects which, in the recital of the deed of trust, he declares it his intention to provide. Therefore, no argument of that description can, in my apprehension, arise out of this recital of the deed.

An argument was attempted to be raised out of the concluding clause, "That if it shall happen that the said rectory of Kirton and other the premises shall at any time hereafter be lawfully evicted, or that by the alteration of times, the rents and profits thereof shall so much decay and fall that the good uses above mentioned cannot be supported and maintained therewith, in such case the said wardens and commonalty shall not be charged with any further payment than the said rectory and other the premises shall in true and just value amount to; and from thenceforth it shall be lawful for the said wardens and commonalty and their successors, to make proportionable abatement of the monies hereinbefore limited to the said several uses, answerable to such decay or fall of the rents thereof, as shall so happen." No

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provision is here made for any increase of rent; the provision is made only with a view to the possible decrease of rent; but it is easy to understand why the provision was framed in that way: it was to prevent all disputes in case there should happen to be decrease of rents; in that case, instead of any particular object being entirely defeated, the Mercers' Company were directed to reduce each of them in proportion. It was with that view, and that view only, as it appears to me, that the clause was introduced.

I have gone further into detail than I should otherwise have done, because it has been contended at the bar that, to confirm this decision of the Chief Baron of the Exchequer, would be to overrule the decision in the case of the Attorney General *v.* the Corporation of Bristol. The principle of that decision is that, which I have stated: that if there is a part of the sum unappropriated, it is a circumstance which courts of justice (and particularly in that case,) have considered as an evidence of the intention of the donor, as to what should take place with respect to any future increase of that sum; but it is only evidence of the intention; and I apprehend the circumstances to which I have adverted, are in this case sufficient to rebut any inference of such an intention, arising from the non-application of the small fractional sum to which I have adverted. I was extremely desirous of knowing what was the opinion of the noble and learned lord by whom that case of the Corporation of Bristol had been decided. The noble and learned lord has looked into the decision in this case, and he does not consider it at all inconsistent with the decision of that case. On the contrary, he agrees with me in opinion, that the decision of the court below

is perfectly correct. Under these circumstances, I should propose to your Lordships that this judgment be affirmed.

Judgment affirmed.

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## ENGLAND.

(COURT OF EXCHEQUER.)

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HIS MAJESTY'S ATTORNEY GENERAL *Respondent.*

By a deed granting lands, &c. to a Corporation of the City of London, to be applied to charitable uses, it was provided, that if the premises should be evicted, the company should be discharged from any further payment or continuance of the uses; and if the premises, by alteration of times, should so much decay in rent that the uses could not be supported therewith, the company should only be chargeable with the payments appointed to Christ's Hospital and to the Company of Barber Surgeons, being 6*l.* yearly; and from thenceforth it should be lawful for the said company to make such abatement of the sums before limited, except the 6*l.* to Christ's Hospital and the Barber Surgeons, as should be answerable to the fall of the rents which should so happen.


Held, that this was conditional, and not a positive charge upon the grantees to be paid by them, at all events so as to furnish an inference, that, being subject to such charge, they must be entitled to a surplus of the rents arising by an increase in the value of the property.

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BY indenture, dated the 12th of May, 1619, John Bancks, citizen and mercer of London, granted, bargained, and sold to Sir Baptist Hicks, and others therein mentioned, and their heirs and assigns, a messuage or tenement, with all buildings, gardens, and other appurtenances thereto belonging, situate in Holloway, in the parish of Islington, in the county

of Middlesex; and also three crofts, or closes of pasture-ground, with the appurtenances, containing by estimation six acres, to the said messuage adjoining.

By a further indenture, also dated the 12th of May, 1619, and made and executed by and between the said John Bancks, of the first part; the said Sir Baptist Hicks, and the other trustees of the second part; and the wardens and commonalty of the Mystery of Mercers of the city of London, of the third part; and by a schedule thereunto annexed, it was declared that the conveyance thereinbefore mentioned, was made upon trust, that the said Sir Baptist Hicks, and the other trustees, should permit the said John Bancks to receive the rents and profits during his life; and that, after his death, they should receive the yearly rent of 17*l.*, for which the said premises were then demised, under a lease granted by the said John Bancks, and all other rents and profits thereof to grow due and payable, and the monies thereof arising, should yearly and for ever, well and truly pay and deliver to the renter-warden of the Company of Mercers for the time being: and that the wardens and commonalty of the Mercers, and their successors, should, from and after the decease of the said John Bancks, yearly, for ever, pay and dispose all the said monies, so from time to time to be paid and delivered to them as aforesaid, to the purposes following: viz. to the governors of Christ's Hospital in London, yearly, the sum of 5*l.* to be distributed as follows: for a sermon on the day of election of the governors, 1*l.* 2*s.*; for a dinner for the governors, 1*l.* 6*s.* 8*d.*; for the two clerks, 2*s.* each; for cakes and wine, 1*l.* 6*s.* 8*d.*; for the steward, 2*s.* 6*d.*, the matron, 2*s.* 6*d.*, the beadles, 4*s.*, making together 9*s.*; for the poor of Christ Church parish, if the sermon should be preached there, 6*s.* 8*d.*

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for the minister of Christ Church, 2*s.* ; for the two clerks and sexton, 3*s.* : and also the sum of 7*l.* 14*s.* for seven sermons, to be preached by learned divines in the Mercers' Church, yearly, upon Midsummer-day, Michaelmas-day, the day of the confirmation of new wardens of the company, and the four general court days of the said company, every sermon 22*s.* ; and also to the renter-warden of the said company, the sum of 1*l.* ; and also to the said company's chaplain, 6*s.* 8*d.* ; and also to the clerk of the said company, 10*s.* ; to the beadle, 3*s.* 4*d.* ; to the sexton and keeper of the chapel, 6*s.* 8*d.* : and also for a dinner, every third or fifth year, for the wardens and some of the feoffees, with three workmen to view the reparations, 3*l.* ; and to each of the three workmen, 2*s.* each ; and also to the Company of Barber Surgeons, London, 20*s.* yearly, to be distributed on the 11th day of May, yearly, to twelve poor householders or widows of the said company, in beef, bread, and two-pence a piece in money, and each of them one wooden platter ; and to the clerk of the same company, 2*s.*

New trustees had been from time to time chosen out of the Mercers' Company, to whom the estate had been from time to time conveyed.

The trust estate consisting of a dwelling-house, and about six acres of land, were let from the year 1631, when the rents became first receivable by the trustees, to 1733, for the annual sum of 17*l.* ; and from the year 1733 to 1776, for the annual sum of 14*l.* About the year 1749, the rent of 14*l.* being insufficient to defray the expenses of the several purposes specified in the indenture hereinbefore mentioned, the seven annual sermons above mentioned were reduced, by a resolution of a general court of the Company

of Mercers, to the number of four, which last mentioned number continued to be preached till the year 1820, when at a general court of the company, held on the 30th of March, the former resolution was rescinded, and the seven sermons had since been preached in the manner directed in the deed.

The premises were let from the year 1776 to 1797 at the rent of 21*l.* per annum; and from the year 1797 to 1816, at a rent of 30*l.* per annum. In the year 1816 the premises were let for the term of seven years, at the annual rent of 84*l.*, which was the rent at the date of the appeal.

All the other payments specified in the indentures, had been satisfied by the company, excepting that as no periodical visit to view the repairs of the tenement took place, no specific dinner was provided, nor were any workmen paid as directed on such visitations, and except that the annuity of 5*l.* to Christ's Hospital, in the year 1811, was purchased by the Company of Mercers from the hospital, under the authority of certain acts of parliament, made and passed for the redemption of the land-tax.

The payments directed to be made under the indenture, amounted to about the sum of 17*l.*, being the then annual value and proceeds of the premises; and the sum of 67*l.* per annum, the excess of the improved rent of the premises, had been, ever since the year 1816, carried to the general account of the Company of Mercers, and applied, with their other funds, for their general purposes, and not to any charitable purpose.

John Bancks, by his will, dated the 20th of May, 1630, among other things, gave and bequeathed to the Company of Mercers the sum of 200*l.*, and he thereby directed and empowered the company to

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lend out from time to time for ever, the said sum to two young men of the said company for the term of five years successively, at the rate and interest of three per cent. per annum; the yearly benefit thereof to be put to the account of his lands at Holloway. This sum was received by the company, but at the time of hearing the cause, the money had not been lent out in the manner directed by the will, no application having been made for the loan.

These facts coming to the knowledge of the commissioners, appointed under the statute 59 Geo. 3. c. 91, in the course of their inquiries, it appeared to them that the Appellants were not entitled to retain such surplus for their own use, but that the whole of the rents ought to be applied to the purposes specified by the donor. They accordingly certified the particulars to the Attorney General, who thereupon filed an information in the Court of Exchequer against the Appellants and their trustees, stating the above circumstances, and praying that it might be declared that the Appellants were mere trustees for the distribution of the whole income of the Charity Estate, and ought to apply the increased rents to the purposes mentioned in the original deed of foundation, or such other charitable purposes as the court should direct; and that they might be decreed to account for all the surplus rents received by them since 1816, as well as for the interest of the sum of 200*l.* bequeathed by the donor's will, and to pay what might appear to be due from them into court, and that it might be referred to one of the Masters of the court to approve of a scheme for the due application of such arrears, and of all the future income.

To this information the Appellants and trustees put in their answer, which admitted the facts alleged.

The answer having been replied to, the cause came on to be heard on the 27th of April, 1826, before the Lord Chief Baron of the Exchequer, when the deeds of foundation having been read, the cause stood for judgment, and on the 30th of May following the Lord Chief Baron pronounced his decree, whereby it was declared, that the Appellants were trustees of the rents, and of the augmented rents of the estates, and of the interest of the sum of 200*l.* in the pleadings mentioned; and that the surplus rents and the said interest, after answering the several payments directed to be made by the said deed of the 12th of May, 1619, were applicable to such and the same purposes as the testator, John Bancks, directed the rents of such estate to be applied to, by the aforesaid deed of the 12th day of May, 1619, without prejudice nevertheless to the question how far the Appellants were intitled to partake of or share the said increased or augmented rents, with reference to their share or benefit in the said original rent given to the Appellants by the said deed of the 12th of May, 1619, and directed accounts of the said rents to be taken accordingly.

From this decree the appeal was presented.

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For the Appellants—*Mr. Bickersteth* and *Mr. Monro*.

For the Respondents—*The Attorney General* and *Mr. Pemberton*.

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*The Lord Chancellor*.—There is another case of a similar description to that which your Lordships have just decided, a case in which the Wardens and Commonalty of the Mystery of Mercers of the City of London, are Appellants, and His Majesty's Attorney

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General, is Respondent. That was a case arising out of a Charity, founded by a person of the name of Banks. The provisions of the deed are extremely similar, and it does not appear to me that there is any material distinction between the two cases. The only distinction adverted to, was, that it was supposed that to the extent of 6*l.* the Corporation would at all events be chargeable; and therefore if they were liable in case of diminution of rents, to the extent of 6*l.*, it was contended that they would be entitled to the surplus; I think this arises entirely from a misapprehension of the nature of the clause. It concludes with a proviso in these terms: "That if it should happen that the messuage and premises should at any time thereafter be lawfully evicted, then and immediately from thenceforth the said company should be discharged from any further payment or continuance of the uses aforesaid, or if the said messuage and other premises should by alteration of times so much decay in rent, that the uses above mentioned could not be supported therewith, in such case the said company should only be chargeable with the payments appointed to Christ's Hospital, and to the Company of Barber Surgeons, being 6*l.* yearly; and from thenceforth it should be lawful for the said Mercers' Company to make such a defalcation and abatement of all the sums of money therein before limited, except the said 6*l.* to Christ's Hospital and the Company of Barber Surgeons, as should be answerable to the fall of rents which should so happen, and as the said Mercers' Company should think fit." I do not think, taking this clause altogether, that it was the intention to make the company at all events chargeable for the payment of 6*l.* to Christ's Hospital and the Company of Barber Surgeons, but that the obvious import of the clause was this: If the

parties are evicted, if the Mercers' Company are entirely evicted from the property, they are to be relieved from all liability; and if there shall be a reduction of the rents, then in the first instance the 6*l.* is at all events to be paid to the Barbers' Company and Christ's Hospital, and the surplus above 6*l.* to be divided among the other objects of the charity, rateably. But on a supposition which it was not very easy to make, that the rents should be reduced below the 6*l.*: it was never intended, as I conceive, on the fair construction of this instrument, that the Mercers' Company would be bound to pay the 6*l.* to the Barbers' Company and Christ's Hospital, but only so much as they should receive. I apprehend that the argument built upon the interpretation of this clause, putting that interpretation upon it, which it was supposed at the bar to bear, cannot be supported, and therefore that this case falls precisely within the principle of the former decision, and therefore I recommend to your Lordships that this Judgment also should be affirmed.

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Judgment affirmed.

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## ENGLAND.

(COURT OF EXCHEQUER.)

HANNAH RUSCOMBE - - - - - *Appellant.*

|                              |   |                     |
|------------------------------|---|---------------------|
| RICHARD HARE, MARY RUSCOMBE, | } | <i>Respondents.</i> |
| WILLIAM LONG, and RICHARD    |   |                     |
| MEADE - - - - -              |   |                     |

N. being intitled to certain lands as issue in tail, conveys them in 1749. by lease and release to a mortgagee in fee to secure 800*l.* borrowed, and levies a fine of the lands pursuant to covenant for the purpose of perfecting the security. In 1762 N. borrows 450*l.*, and charges it upon the same lands by deed-poll. N. died in 1764, leaving the charge upon the lands of the aggregate sum of 1,250*l.*, with an arrear of interest, and he by his will devised all his lands to M. his wife. In 1766, M. having married A. B., they by lease and release reciting the mortgage, and that A. B. had paid the interest, grant and confirm the mortgaged lands to the mortgagee, reserving the equity of redemption to A. B., his heirs, &c. By a deed in 1789, 300*l.*, an arrear of interest, is added to the principal, and the aggregate sum of 1,550*l.* is charged on the lands, subject to redemption as by the former deed. M. died in 1794, leaving R. H., a son by the first husband, her heir at law. In 1797 A. B. sold part of the mortgaged lands, and in consideration of 2,000*l.* principal and interest, paid to the mortgagee, and 600*l.* paid to A. B., he and the mortgagee conveyed such part of the lands to R. R., the purchaser. The rest of the lands was conveyed by the mortgagee to A. B. who died in 1799, Under these circumstances the heir at law of M. filed a bill in the Exchequer to redeem the lands, and the court decreed that he was intitled to redeem on payment of the principal money due upon the mortgage, and interest calculated from the death of A. B. Upon appeal to the House of Lords from this decree, it was declared that R. H., as heir at law of M., was intitled, notwithstanding the proviso for redemption reserved to A. B. by the deed made between him and the mortgagee, to redeem the lands "on payment of the principal money and interest, due at the death of M. on the aggregate sum of 1,250*l.* Such in-

*terest to be computed according to the proviso in the indenture of release and mortgage."* A. B., being intitled in equity to have the interest due at the death of his wife added to the principal, and considered as an aggregate sum with the principal, A. B. and M. his wife not being bound to keep down the interest during her life for the benefit of her heir at law, &c. and that an account should be taken of what was due for principal and interest on the mortgage at the death of M. The decree of the Exchequer being varied according to this order, it was referred to the Master to take the accounts so directed, and it appeared in evidence before him that A. B. and M. his wife, during her life, paid to the mortgagee, on account of interest, 1,500*l.*; that the Master in his report did not include this sum, but reported that there was due upon this account for principal 1,250*l.* and for interest at the death of M. 286*l.* 9*s.* 2*d.* On this ground exceptions were taken to the report, which being in this respect confirmed, and a decree made upon farther directions accordingly, a farther appeal was presented to the House of Lords.

But the decree was affirmed, the House being of opinion that the representative of the husband was not intitled, as against the heir of the wife, to an allowance of interest actually paid by the husband during the life of his wife, and that the former order of the House, directing the account of interest due on the mortgage at the death of M. meant interest actually due.

BY a will, made in the year 1724, Nicholas Hare devised the lands in question in this cause to his son Nicholas Hare for 99 years, if he should so long live; and after the determination of that estate, unto the issue of the body of that son, lawfully begotten, with remainders over.

Nicholas Hare, the son, entered upon the lands, and continued in possession till he died intestate, whereupon his son, Nicholas Hare, who was the grandson of the first named Nicholas Hare, became possessed of, and intitled to the lands. By indentures of lease and release dated the 1st and 2nd days of March, 1749, the release being made between Nicholas Hare the grandson, on the one part, and William House of the

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other part, Nicholas Hare, in consideration of 800*l.* paid to him by William House, conveyed unto the said William House, his heirs and assigns, all and singular the estates devised by the said will, as also other estates, of which Nicholas Hare the grandson was seised in fee, to hold the same unto and to the use of William House, his heirs and assigns, with a proviso for redeeming the same on payment of the sum of 800*l.*, with interest at the rate of 4*l.* 5*s.* per cent. per annum, which William House agreed to accept in lieu of 5*l.* per cent. per annum, in case of punctual payment; and Nicholas Hare covenanted with William House to levy a fine of the estates, which was afterwards duly levied accordingly.

In a few years afterwards Nicholas Hare borrowed a further sum of 450*l.* from William House, on the security of the same estates, and in order to perfect the security, Nicholas Hare executed a deed-poll, dated the 1st day of June, 1762, whereby he charged all the lands with the payment of the sum of 450*l.*, and interest at the rate of 4*l.* 5*s.* per cent. per annum.

Nicholas Hare, the mortgagor, never redeemed the lands, but died in the year 1764, having by his will, dated the 21st of June, 1757, devised all his freehold estates and lands of inheritance whatsoever, to his wife Mary Hare, her heirs and assigns, and he appointed her sole executrix of his will, and she duly proved the same.

In the year 1765, Mary Hare intermarried with Alexander Bruford the elder, and Alexander Bruford the elder, and his wife, were in the possession of the mortgaged estates from the death of Nicholas Hare, the mortgagor, until the death of Mary Bruford.

In the year 1766 Alexander Bruford the elder, and Mary his wife, executed certain indentures of lease and release, bearing date the 2d and 3d of February,

1766, which were made between Alexander Bruford and Mary his wife, of the one part, and William House of the other part, whereby, after reciting the indentures of lease and release of the 1st and 2d of March, 1749, and the deed-poll of the 1st of June, 1762, and that the sums of 800*l.* and 450*l.* thereby secured, were not paid; and after also reciting the death of Nicholas Hare, and his will, and the marriage of Mary Hare with Alexander Bruford, and that the sums of 800*l.* and 450*l.* were still due, but that *all the interest had been paid up to that time by Alexander Bruford*; it was witnessed, that for the better securing the two several sums of 800*l.* and 450*l.* unto William House, his executors, administrators, and assigns, together with interest for the same, as therein mentioned, Alexander Bruford and Mary his wife granted, &c. to William House, his heirs and assigns, all the estates, to hold the estates unto and to the use of William House, his heirs and assigns, discharged of the former proviso for redemption, but subject to the proviso therein contained, viz. that in case Alexander Bruford, his executors, administrators, or assigns should pay the two several sums of 800*l.* and 450*l.*, and all interest due thereon, at the time therein mentioned, to William House, his executors, administrators, or assigns, clear of all incumbrances, the said William House, his heirs or assigns, would at any time or times thereafter, at the request, and at the costs and charges in the law of Alexander Bruford, his heirs or assigns, release and convey the messuages or tenements, lands, and premises thereby released, to the said Alexander Bruford, his heirs and assigns for ever, or as he or they should in that behalf direct or appoint; and it was thereby declared and agreed, by and between the parties thereto, and Alexander Bruford and

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Mary his wife did jointly and separately declare and agree, that all fines and recoveries, conveyances, and assurances theretofore made, levied, or suffered of the said premises, and particularly a fine then agreed to be levied, and which Alexander Bruford covenanted for himself and Mary his wife, to levy to William House, his heirs and assigns, should be and enure to and for the proper use of William House, his heirs and assigns, subject to the condition of redemption, above mentioned.

The fine was afterwards levied according to the covenant, and Alexander Bruford executed a bond to William House, as a collateral security for the due payment of the said mortgage money.

The interest on the mortgage was not duly paid, and in the year 1789 there was due to William House, the sum of 300*l.* for interest on the 1,250*l.*; whereupon Alexander Bruford the elder and William House agreed that the interest should be added to the principal sum, and that a further mortgage should be made to secure the same, and that accordingly an indenture, dated the 3d of February, 1789, was made between Alexander Bruford of the one part, and William House of the other part, whereby it was witnessed, that in order to secure the two sums of 1,250*l.* and 300*l.*, making together 1,550*l.*, the said Alexander Bruford did grant, release, and confirm to William House, his heirs and assigns, all the aforesaid estates, to hold the same in fee, subject to redemption, on payment by Alexander Bruford, his heirs or assigns, of the principal sum of 1,550*l.* with interest.

William House, the mortgagee, died on the 21st of May, 1791, leaving his son William House his heir-at-law, and having by his will appointed his son his sole executor; William House, the son, proved

his father's will, and thereby became his legal personal representative.

Mary Bruford, the wife of Alexander Bruford the elder, died in the year 1794, leaving Richard Hare, her only child by her first husband, Nicholas Hare, her heir-at-law, Alexander Bruford the elder, her second husband, and Alexander Bruford, her eldest son by her second marriage.

In the year 1797 Alexander Bruford the elder agreed with Richard Ruscombe for the sale to him of part of the mortgaged estates, and thereupon indentures of lease and release, bearing date respectively the 20th and 21st of June, 1797, were made between William House, the son of the mortgagee, of the first part, Alexander Bruford of the second part, Richard Ruscombe of the third part, and William Long of the fourth part; whereby after reciting, amongst other things, that upon an account that day made up and fairly stated by and between Alexander Bruford the elder and William House, there appeared to be due and owing to William House, for principal and interest, on and by virtue of the several therein recited securities, the full sum of 2,000*l.*; it was witnessed, that in consideration of the sum of 2,000*l.* to the said William House, paid by Richard Ruscombe, and of the further sum of 600*l.* paid by Richard Ruscombe to Alexander Bruford the elder, William House released and conveyed, and Alexander Bruford the elder granted, ratified, and confirmed unto Richard Ruscombe and William Long, the estates and premises therein particularly described, which were part of the mortgaged estates, to hold to Richard Ruscombe and William Long, to the use of such person, and for such purpose, as Richard Ruscombe by deed or will should appoint; and in default thereof, to the

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use of William Long, his heirs and assigns, during the life of Richard Ruscombe, but in trust for Richard Ruscombe; and after the determination of that estate, to the use of the right heirs of Richard Ruscombe.

Upon the execution of the conveyance, Richard Ruscombe paid his purchase money, and was let into possession of that part of the estate which was so purchased by him, and he continued in possession thereof to the time of his death.

The mortgage to William House was, by means of the 2,000*l.* paid to him, fully paid off and satisfied, and William House reconveyed the remainder of the estates to Alexander Bruford the elder, and the same was held and enjoyed by Alexander Bruford the elder during the remainder of his life.

Alexander Bruford the elder died in the month of May, 1799, having by his will appointed his sons, namely, Alexander Bruford, who was his heir-at-law, and Francis Bruford, his executors; and he also devised to them, in fee, all his real estates.

Alexander Bruford and Francis Bruford proved the will of their father, and on his death entered upon and took possession of the remainder of the mortgaged estates so reconveyed to their father by William House as aforesaid, and they continued in possession thereof at the time when the present suit was instituted by Richard Hare, the heir-at-law of Mary Bruford.

The suit was instituted in the Court of Exchequer in Trinity Term, 1800, by Richard Hare, against William House, Richard Ruscombe, Alexander Bruford, Francis Bruford, and William Long; and William House having died, the suit was revived against Mary Woodland, his heiress-at-law and executrix, and Francis Bruford having become bankrupt, a supplemental bill was filed against William Gray and

John Slade, his assignees, and the original bill was amended; and by the bill it was stated to the effect aforesaid, and that Richard Hare was entitled to the possession of the estates, subject to the mortgages which affected the same, and therefore prayed that the usual accounts might be taken, and that upon payment by the said Richard Hare of what should be found due to the said William House upon taking the accounts, Richard Hare might be at liberty to redeem the premises; and that William House, and all necessary parties might be decreed to convey the premises to Richard Hare, and to deliver to him the possession thereof, and of all deeds, papers, and writings relating thereto.

Alexander Bruford and Francis Bruford, by their answer, submitted, that under the several assurances and transactions therein stated, the mortgaged estates absolutely vested in their father, Alexander Bruford the elder, in fee, subject only to the payment of what was due on the mortgage to William House, and they respectively claimed to be entitled to the absolute fee simple and inheritance, as tenants in common, of all such part of the estates and premises contained in the indentures of the 1st and 2d March, 1749, as had not been purchased by and conveyed to Richard Ruscombe.

Richard Ruscombe, by his answer, set forth his purchase deed, and claimed to be entitled in fee to the estate and premises therein conveyed, as a purchaser for a valuable consideration, without notice of Richard Hare's alleged title or claim.

William Long, by his answer, stated that he was seised of the estate sold to the Appellant Richard Ruscombe, as his trustee only; and that he had not any beneficial interest therein.

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William Gray and John Slade having also answered the bill, the answers were replied to, and the cause was heard on the 17th of December, 1813; and by the decree which bore date the 2d of July, 1814, (being then passed and entered,) it was declared that Richard Hare was entitled to redeem the estates, and such accounts as therein mentioned were directed to be taken. In the directions for taking such accounts no interest was directed to be allowed to Richard Ruscombe upon the mortgage, prior to the death of Alexander Bruford the elder.

From this decree Richard Ruscombe and Alexander Bruford appealed to the House of Lords, praying that the decree might be reversed, and submitted that if the same ought not to be wholly reversed, yet that the same should be varied, because, at the death of Alexander Bruford the elder, no interest had been paid upon the mortgage for many years, which amounted in the year 1797, together with the principal money, to the sum of 2,000*l.*, as appeared by the deeds of the 20th and 21st of June, 1797; whereas by the decree no interest was allowed to Richard Ruscombe upon the mortgage, prior to the death of Alexander Bruford.

Pending the appeal Richard Ruscombe died, having made his will, whereby he devised all his estates to William Long and Richard Meade, in trust for Hannah Ruscombe his widow, and Mary Ruscombe his daughter; and he appointed Hannah Ruscombe his sole executrix and residuary legatee, who proved the will; and upon the petition of Alexander Bruford, William Long, Richard Meade, Hannah Ruscombe, and Mary Ruscombe, the appeal being revived, it was heard on the 23d of June, 1817, and the 6th of February, 1818; and by an order of the House of

Lords, dated the 9th of June, 1818, it was ordered and adjudged that the decree of the Court of Exchequer should be varied as therein mentioned; and that it should be referred back to the court, to review the decree, and to vary the same accordingly, and to make such further order as should be consistent therewith, and as the nature and circumstances of the case, and the deaths of parties might require.

In pursuance of the order of the House of Lords, and by an order of the Court of Exchequer, dated the 27th of February, 1819, it was ordered, that the said order of the House of Lords should be incorporated in the decree, and the decree varied accordingly. By the decree so varied, it was declared that the Plaintiff Richard Hare, as the heir-at-law of Mary, his late mother, by Nicholas Hare, her first husband, became entitled in equity, upon the death of his mother, to retain the estates in question, subject to the interest for life therein, of Alexander Bruford the elder, deceased, her second husband, notwithstanding the words of the proviso for redemption, contained in the indenture of release and mortgage of the 3d of February, 1766, in the pleadings mentioned, made between Alexander Bruford the elder, deceased, and Mary, then his wife, of the one part, and William House, deceased, of the other part, upon payment of the principal money and interest, due at the death of the said Mary, on the principal sums of 800*l.* and 450*l.* making together the sum of 1,250*l.* in the indenture of release and mortgage mentioned, such interest to be computed according to the proviso in the indenture of release and mortgage, Alexander Bruford the elder being entitled in equity to have the interest due at the death of his wife, added to the principal, the said Alexander Bruford and Mary his wife not being

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bound to keep down the interest during her life for the benefit of her heir-at-law: And it was further declared that Alexander Bruford the elder, as tenant by the courtesy, was bound to keep down the interest of such aggregate sum out of the rents and profits of the estates, which afterwards accrued during his life; and that the Defendant Richard Ruscombe having purchased part of the estates, and out of the purchase money paid the principal and interest on the mortgage, was entitled to stand as mortgagee of the part of the estates conveyed to him for the aggregate sum of principal and interest, due at the death of Mary, as an aggregate principal sum, which Alexander Bruford the elder had a right to have charged on the mortgaged estates; but that the Defendant Richard Ruscombe, standing as a purchaser in the place of Alexander Bruford, who was entitled to the whole of the estates for his life, as tenant by the courtesy, was bound to keep down the interest of such aggregate sum, during the life of Alexander Bruford the elder, so far as the rents and profits of the estates conveyed to him, and accrued during that time, would extend: And it was by the decree referred to the Deputy Remembrancer of the Court, to take an account of what was due to the Defendant Richard Ruscombe for principal and interest, on the indenture of release and mortgage of the 3d of February, 1766, in the pleadings mentioned, at the death of Mary Bruford: and it was ordered that the sum so due to the Defendant Richard Ruscombe, for principal and interest, at the death of Mary Bruford, should form an aggregate sum chargeable on the estates, by virtue of the last-mentioned indenture of mortgage. It was also referred to the Deputy Remembrancer to take an account of what was then due for interest on such aggregate

sum, computing such interest from the death of Mary Bruford, according to the rate of interest provided by the last-mentioned indenture of mortgage: And the Deputy Remembrancer was also to take an account of what (if any thing) had been paid, laid out, or expended by the Defendant Richard Ruscombe, in his lifetime, or by Hannah Ruscombe since his decease, for necessary repairs and lasting improvements in and upon the mortgaged premises, and to tax the Defendant Hannah Ruscombe, and her late husband Richard Ruscombe, their costs of this suit, except such parts of the costs as related to, or had been occasioned by, the Defendant Richard Ruscombe, insisting upon being a purchaser of the estates for a valuable consideration: And the Deputy Remembrancer was also to take an account of the rents and profits of part of the estates conveyed to Richard Ruscombe, and received by him in his lifetime, or by Hannah Ruscombe since his decease, or which, without their wilful default, might have been received after the death of Mary Bruford: and if it should appear that such part of the rents and profits, as accrued due during the lifetime of Alexander Bruford the elder, and received by Richard Ruscombe, after allowances for repairs and improvements, exceeded the interest of the aggregate sum computed from the death of Mary Bruford to the death of Alexander Bruford the elder, it was declared that Richard Ruscombe was entitled to retain such excess, as standing in the place of Alexander Bruford the elder; but if such last-mentioned rents and profits, after such allowance as aforesaid, should appear not to have been sufficient to keep down the interest which accrued during the same time on such aggregate sum, then the court declared that Richard Ruscombe was entitled to stand as a creditor on the part

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of the estates so conveyed to him for the difference, such difference to be paid out of the future rents and profits of such part of the estates which were received by him : And for that purpose it was further ordered, that it should also be referred to the Deputy Remembrancer to take distinct accounts, as against Richard Ruscombe, on the interest of the aggregate amount of principal and interest due at the death of Mary Bruford, from the time of her death to the death of Alexander Bruford the elder : and also of the rents and profits which accrued due in the lifetime of Alexander Bruford, after the death of Mary Bruford, received by Richard Ruscombe ; and if such rents and profits, after the allowances aforesaid, should appear not to have been sufficient to keep down the interest of such aggregate sum during the life of Alexander Bruford the elder, then the Deputy Remembrancer was to carry the deficiency to the account of the rents and profits received by Richard Ruscombe after the death of Alexander Bruford the elder, and to add the same to the interest which accrued due on the aggregate sums after his death ; and it was further ordered that the rents and profits, which accrued after the death of Alexander Bruford the elder, should be applied, by the said Deputy Remembrancer, first, in payment of the deficiency (if any) of the rents and profits accrued in the lifetime of Alexander Bruford the elder, to pay the interest accrued in his lifetime as aforesaid : and after such application, or in case there should be no such deficiency, then in the discharge of the interest of the aggregate sum accrued after the death of the said Alexander Bruford the elder ; and that the Deputy Remembrancer should ascertain the balance due to or from Richard Ruscombe accordingly ; and that the rents and profits

from time to time accrued after the death of Alexander Bruford the elder, should be applied by the Deputy Remembrancer, first, to keep down the interest, and then to diminish the principal of such aggregate sum; and in taking the said accounts, the Deputy Remembrancer was to make such annual rests as he should think fit; and he was to appoint a time and place for payment by the said Plaintiff to the said Defendant Hannah Ruscombe, of what he should find to be due to the said Hannah Ruscombe, upon taking the aforesaid accounts; and it was further ordered by the court, that in default of payment by the Plaintiff, of what the Deputy-Remembrancer should find to be due to the Defendant Hannah Ruscombe as aforesaid, the Plaintiff's bills should be, and they were thereby dismissed out of the said court, so far as they regarded the Defendant Hannah, and the late Defendant Richard Ruscombe, with costs, to be taxed by the Deputy Remembrancer, to whom it was thereby referred to tax the same accordingly; and it was further ordered and decreed by the court, that upon payment of what (if any thing) should appear to be due to Hannah Ruscombe on the account so to be taken, together with her and Richard Ruscombe's costs as before directed; or if it should appear that Hannah Ruscombe had been over paid, according to the manner of taking the accounts before directed, then that Hannah Ruscombe, and all proper parties, should convey the mortgaged premises, so conveyed to Richard Ruscombe as therein mentioned, to Richard Hare, and his heirs, or as he should appoint, freed from any charges or incumbrances, made, done, or suffered by Richard Ruscombe, or any person or persons claiming by, from, or under him, such conveyance to be settled by the Deputy Remembrancer,

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in case the parties differed about the same; and that Hannah Ruscombe should pay to Richard Hare, the balance (if any) of the rents and profits which should be found to be due to her, according to the accounts before directed to be taken; and the Defendants were to deliver up to the Plaintiff Richard Hare, or as he should direct, upon oath, all deeds, evidences, and writings in their, or any or either of their custody or power, relating to the mortgaged premises, so to be conveyed to them: and the decree contained such further directions as therein mentioned, in relation to the part of the said estates which was not sold to the said Richard Ruscombe.

By the evidence produced before the Master, to whom the reference mentioned in the decree was transferred, it appeared that Mary Bruford died on the 3d of September, 1794; and that, at the time of her death, the principal sum of 1,250*l.* remained due on the mortgage; and the sum of 286*l.* 9*s.* 2*d.* for interest thereon, was due and unpaid to the mortgagee: but that all interest thereon, except the sum of 286*l.* 9*s.* 2*d.*, had been paid; and that Alexander Bruford the elder had paid interest to the amount of 1,500*l.*; and thereupon it was claimed, on the part of Hannah Ruscombe, as representing Richard Ruscombe, the purchaser, that the mortgage money, or sum of 1,250*l.*, together with the sum of 1,500*l.* interest thereon, paid by Alexander Bruford the elder, and the further sum of 286*l.* 9*s.* 2*d.* interest, due at the death of Mary Bruford, ought to form the aggregate sum, on the payment of which, with interest from the death of Mary Bruford, the plaintiff was declared to be entitled to redeem the premises. But the Master did not admit such claim; but, by his report, dated the 2d of March, 1825, found that, at

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the death of Mary Bruford, there was due on the mortgage, for principal money, the sum of 1,250*l.*, and for interest, the sum of 286*l.* 9*s.* 2*d.*, making an aggregate sum of 1,536*l.* 9*s.* 2*d.*, on which he calculated interest as in his report mentioned; and upon such computation, and making such several allowances as in his report mentioned, he found that, on the 2d of September, 1825, the principal money and interest due on the mortgage would be reduced to the sum of 214*l.* 10*s.* 4*d.*, which, being added to 175*l.* 6*s.* 5*d.* allowed for costs, made the sum of 389*l.* 16*s.* 9*d.*, which he appointed to be paid by the plaintiff to Hannah Ruscombe.

The Defendant, Hannah Ruscombe, took six exceptions to the report; the first exception was to the following effect, viz. :—For that the Master had, by his report, stated, that at the death of Mary Bruford, there was due, for principal money on the indentures of lease and release, and mortgage of the 3d of February, 1766, the sum of 1,250*l.*, and for interest thereon to that time, the sum of 286*l.* 9*s.* 2*d.*; whereas it was declared by the decree in the causes bearing date the 17th of December, 1813, as varied by an order of the court, bearing date the 27th of February, 1819, that Alexander Bruford the elder, and Mary his wife, were not bound to keep down the interest of the mortgage during her life for the benefit of her heir-at-law: And it was in evidence before the Master that Alexander Bruford, and Mary his wife, did, during her life, make divers payments to the mortgagee, on account of the interest of the said mortgage, to the amount in the whole of the sum of 1,500*l.*; in respect whereof, and as against the heir of the mortgagor, Alexander Bruford the elder was entitled to stand in the place of the mortgagee; and the Master ought therefore to have found, and stated in his report,

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that at the death of Mary Bruford there was due to Alexander Bruford, for interest on the mortgage, not only the sum of 286*l.* 9*s.* 2*d.*, but also the further sum of 1,500*l.*; and that the principal money and interest, due on the mortgage at the death of Mary Bruford, made an aggregate sum of 3,036*l.* 9*s.* 2*d.*

By the second exception, objection was taken to the Master's report in respect of the computations he had made, upon the footing that no more than 286*l.* 9*s.* 2*d.* was due for interest on the mortgage at the death of Mary Bruford.

The fifth exception was as follows:—For that the Master hath, by his report, stated that he hath proceeded to calculate interest on the aggregate sum of 1,536*l.* 9*s.* 2*d.* accrued subsequent to the death of Alexander Bruford the elder, down to the date of his report; and that by making such application as therein mentioned of the rents and profits of the estate, and making such rests as therein mentioned, he found that the principal money due on the mortgage, after satisfaction of all interest accrued in respect thereof, would, on the 2*d* of September, 1825, six months from the date of his report, have been reduced to the sum of 214*l.* 10*s.* 4*d.*; whereas the Master ought to have calculated interest on the aggregate sum of 3,036*l.* 9*s.* 2*d.*, and to have found that after applying the rents and profits of the estate as directed by the decree, there would, on the 2*d* of September, 1825, be due for principal money and interest on the mortgage the sum of 5,264*l.* 8*s.* 7*d.*

The exceptions were heard before the Lord Chief Baron of the Court of Exchequer on the 13*th* of July, 1825; and his Lordship was thereupon pleased to order that the first, second, and sixth of the exceptions should be, and the same were accordingly overruled; and that it should be referred back to the said

Master to review his report, so far as the third and fifth of the said exceptions had relation thereto; and that the fourth exception should be allowed.

The Master made his further report on the 24th of April, 1826; and therein again found, that on the death of Mary Bruford there was due on the mortgage, for principal money, the sum of 1,250*l.*, and for interest the sum of 286*l.* 9*s.* 2*d.*, making an aggregate sum of 1,536*l.* 9*s.* 2*d.*; on which he proceeded to compute interest, without allowing any thing for the interest of the mortgage debt, which had been voluntarily paid by Alexander Bruford the elder, in the lifetime of his wife; and by making such allowance as in the report mentioned, he found, that on the 24th of October, 1826, the principal money due on the mortgage would be reduced to the sum of 602*l.* 10*s.* 2*d.*, which being added to the sum of 175*l.* 6*s.* 5*d.* allowed for costs, amounted to the sum of 777*l.* 16*s.* 7*d.*, which he appointed to be paid by the Plaintiff to Hannah Ruscombe on the 24th of October.

On the 1st of June, 1826, the cause came on to be further heard, on the coming in of the reports, before the Lord Chief Baron, who thereupon ordered that the report dated the 2d of March, 1826, except so far as the third, fourth, and fifth of the exceptions taken to the same had relation thereto, and that the report of the 24th of April should be confirmed: And it was further ordered and decreed by the court, that it should be, and it was thereby referred to the Master, to tax the Defendant Hannah Ruscombe her costs of the suit, incurred subsequent to the last taxation; and also to tax the Defendant William Long his costs of that day's appearance: And it was thereby also referred to the Master to appoint a time and place for the payment of such taxed costs as thereafter directed, and for the other purposes thereafter mentioned: And it

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was thereby also referred to the Master, to carry on the account of interest on the indenture of release and mortgage of the 3d of February, 1766, in the pleadings mentioned; and of the rents and profits of the mortgaged premises in the pleadings mentioned, conveyed to the late Defendant Richard Ruscombe, up to the time to be appointed by him: And it was further ordered by the court, that the Plaintiff Richard Hare should, at such time and place as the Master should appoint, pay to the Defendant Hannah Ruscombe, as the personal representative of the late Defendant Richard Ruscombe what the Master should find to be due in respect of principal and interest on the mortgage at the time so to be appointed by him, together with the sum of 175*l.* 6*s.* 5*d.* taxed and allowed by the Master, by his report of the 2d of March, 1825, for the costs of this suit, of the Defendant Hannah Ruscombe, together with the sum of 25*l.* 17*s.* 4*d.* taxed and allowed by the Master, by his report of the 24th of April, 1826, for the subsequent costs of Hannah Ruscombe, together also with the amount which the Master should allow to the last-named Defendant for her costs incurred subsequent to the last taxation, and directed to be taxed as aforesaid; and that the Plaintiff Richard Ruscombe, should pay the amount which the Master should allow for the taxed costs of the Defendant William Long of appearing upon the hearing, to the Defendant William Long, or to Mr. Bryan Holme, his solicitor: And it was further ordered and decreed by the court, that the Defendant Hannah Ruscombe and the several other parties to these suits, who appeared to have any interest in the mortgaged premises conveyed to the late Defendant Richard Ruscombe, as in the pleadings of these causes mentioned, at the time and place so to

be appointed by the Master, as thereinbefore directed, should convey the mortgaged premises to the Plaintiff Richard Hare, and his heirs, or as he should appoint, free and clear of and from any charges or incumbrances made, done, or suffered by Richard Ruscombe, or by any person or persons claiming by, from, or under him: And it was thereby referred to the Master to settle such conveyance, in case the parties differed in settling the same: And it was further ordered and decreed by the court, that the Defendants, at the time and place so to be appointed by the Master as aforesaid, should deliver up to Richard Hare, or as he should direct, upon oath, all deeds, evidences, and writings in their, or any or either of their custody or power, relating to the said mortgaged estate and premises, or any part thereof: And it was further ordered, to the effect in the decree mentioned, in relation to such part of the estate as was not sold to Richard Ruscombe.

The Master, in pursuance of the last mentioned decree, found and certified that on the 22d day of February, 1827, the sum of 806*l.* 2*s.* 6*d.* would be due to the Appellant from Richard Hare, and he appointed the same to be then paid.

The appeal was against so much of the order of the 13th of July, 1825, as over-ruled the first and second of the exceptions, and so much of the order of the 1st of June, 1826, as confirmed the report of the 2d of March, 1825, except so far as the third, fourth, and fifth of the exceptions had relation thereto, and as confirmed the report of the 24th of April, 1826, and as directed the Appellant to convey the mortgaged premises on payment of the money therein mentioned, without making any allowance for the interest which was paid on the mortgage by

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Alexander Bruford the elder, in the lifetime of his wife.

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For the Appellant—*Mr. Bickersteth* and *Mr. Jacob*.

For the Respondents—*Mr. Agar* and *Mr. Pepys*.

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For the Appellant it was argued, that the order of the House of Lords did not conclude the question as to the claim for interest; that Alexander Bruford the elder, and Mary his wife, being under no obligation to pay the interest of the mortgage for the benefit of her heir, ought to be considered to have advanced the money which they paid to the mortgagee on security of the estate: that Alexander Bruford was therefore entitled to add the same to the money which was due to the mortgagee on the death of his wife, so as to form the aggregate sum then chargeable on the estate; and that Richard Ruscombe, as purchaser from Alexander Bruford and the mortgagee, was entitled to the full benefit of such charge.

It was further argued, that where parties had a qualified interest in an estate tail, or paid off an incumbrance under a misapprehension as to their interest, the charge is held, in a Court of Equity, to be still subsisting, although no assignment of the security and debt has been taken to keep it alive.—*The Countess of Shrewsbury v. The Earl of Shrewsbury*, 3 B. C. C. 120. 1 Ves J. 227. *Kirkham v. Smith*, 1 Ves. 258. *The Earl of Bucks v. Hobart*, 3 Swa. 186.\*

For the Respondents it was contended, that the decision of the court below was according to the true

\* See also *Ware v. Polhill*, 11 Ves. 257, 274. *Redington v. Redington*, 1 Ba. and B. 131.

construction of the order of the House of Lords on the former appeal.

As to the principal question, if not concluded, they contended that the case of *Amesbury v. Brown*\* was conclusive.

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At the conclusion of the argument the Lord Chancellor said he entertained no doubt whatever on the subject that the word "due" must mean the interest actually due; but as Lord Eldon had expressed a desire to be present on the question for judgment he should defer proposing it.†

*The Lord Chancellor.*—There is a case of *Ruscombe v. Hare*, which was heard at the bar of this House on Wednesday last. At the close of the hearing of the cause I expressed to you what my opinion was upon the general law as applicable to the subject, and with reference to the construction of a particular order which was the subject of discussion. I declined recommending to you to pronounce a final judgment upon the question, until I had had an opportunity of having some communication with the noble and learned Lord, by whom it was supposed that order was framed. I have since had an opportunity of conversing with that noble and learned Lord, and he has informed me that the order was not framed by him, but was framed by another noble and learned Lord, a member of this House. Both those noble Lords are of opinion, with respect to the general law, that what I took the liberty of stating to you was

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\* 1 Ves. 477.

† This was in substance and form the whole matter of the observations made by the Lord Chancellor at the close of the argument.

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correct; and they are also of opinion that I put the proper interpretation upon the order which was so framed. I should, therefore, recommend to you that the judgment of the Court of Exchequer be affirmed.

Judgment affirmed.

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## ENGLAND.

(COURT OF CHANCERY.)

GEORGE BURNAND and MARY, his Wife, } *Appellants.*  
 and WILLIAM BROUGHTON FLEXNEY }

JAMES NEROT - - - - - *Respondent.*

A., by his will declaring a purpose to assign the lease of Hotel, in which he carried on business, with the effects in the Hotel, and the business of it, to a trustee in trust for the benefit of his son and daughter, in consideration of an annuity to be paid to him for his life, bequeathed the residue of his personal estate and effects to his son and daughter in equal shares. The testator died without having carried into effect the purpose declared in his will. His daughter being executrix carried on the business from the death of the testator to the year 1810 in the house where the testator had carried it on. In that year she purchased, chiefly by means of the assets, the freehold of another house to which she removed the business, and carried it on there alone until 1819, when she married. Upon the marriage, the freehold house and effects were conveyed and assigned to a trustee for the daughter and her husband, and the children of the marriage in the ordinary course of settlement. In 1820 the son filed a bill against the daughter and her husband, praying that the deed of settlement might be set aside; that the freehold house might be declared to be part of the assets, and sold with the effects, &c.; that an account might be taken of the profits of the business, from the death of the testator to 1819, the date of the marriage; and that half the assets and half the profits of the business might be paid to him as residuary legatee and partner.

The case of the Plaintiff as to the partnership was supported by the evidence of the will, and of acts and admissions on the part of his sister at various times before the marriage, of her liability to account as partner. The Defendants insisted upon an agreement between the Plaintiff and his sister, shortly after the

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death of the father, that the lease of the Hotel and the effects should be valued, and the produce divided between them; that they were accordingly valued, and that the half of the amount of the valuation had been paid to the Plaintiff by his sister; but this alleged agreement did not include any consideration for the good will of the business. The Defendants also produced in evidence a letter written from Paris by the Plaintiff, in which he spoke of the business as not belonging to him; but this letter he sought to explain, by stating that he could not with safety, being in France, acknowledge that he had any property or concerns in England. Upon these pleadings and evidence at the hearing, issues were directed to try: 1, whether there was any agreement for the sale of the lease, effects, and goodwill of the business; and if so, 2, whether such agreement had been abandoned. Upon the trial of these issues verdicts were given for the Respondent on both issues. Upon further directions the court (Vice Chancellor) declared that a partnership in moieties subsisted between the son and daughter, from the death of the father to the marriage of the daughter, when the partnership was dissolved, and that the freehold house was part of the assets, and an account was directed accordingly.

Against this decree the Defendants appealed to the Chancellor, and the decree being affirmed with a slight variation, the Defendants further appealed to Parliament, and insisted that an issue should be directed to try the question of fact whether a partnership subsisted; but the decree was affirmed, the House being of opinion that it was too late in that stage of the cause to ask for such issue.

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**JOHN NEROT** for many years preceding, and at the time of his death, carried on business as an Hotel-keeper, in a house known by the name of Nerot's Hotel. On the 30th of January, 1798, he made his will, whereby, after directing that all his debts, funeral and testamentary charges and expenses, should be paid by his executors; and after declaring it to be his intention to assign to John Dax the Hotel wherein he, the testator, then resided in King-street, for the

remainder of the term therein, under the lease, whereby he held the same, and also all his effects whatsoever which then were in the said Hotel, and the business thereof, in trust for the benefit of his son and daughter, the Appellant, Mary Burnand, then Mary Nerot, and the Respondent, as had been proposed and agreed to by him, subject to their paying to him an annuity to be agreed upon between them for his life, he thereby disposed of the residue of his personal estate and effects in manner following: that is to say, he thereby directed that all such sums of money as had been, or should be, advanced or paid by him to his son and daughter, or for their use or benefit, should be retained and kept by each of them respectively, and should not be accounted for or paid by either of them as a debt due to him or his estate at the time of his decease, or for making an equality between them, or otherwise; but in order to put his daughter upon an equal footing with his son, as near as might be in regard to such advancements, he thereby bequeathed to his daughter the sum of 260*l.* to be paid to, or received and taken by her, out of the monies arising from his personal estate and effects, as and when she should think fit after his decease; and he thereby also bequeathed to his son and daughter, 10*l.*, and the like sum of 10*l.* to John Dax, for mourning and a ring; as to all the residue and remainder of his personal estate and effects, of what nature or kind soever, which he should be possessed of, interested in, or entitled to, at the time of his death, except the Hotel, and the plate, furniture, and effects in the same, and which he intended to assign and make over in trust for the benefit of his daughter and son, upon the terms therein mentioned, he thereby bequeathed the same, and every part thereof, unto his daughter and

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son, the Appellant, Mary Burnand, (then Mary Nerot) and the Respondent, in equal parts or shares for their respective use and benefit; and he directed that the annual income and produce of such part of his estate, as his son would be entitled to, should, during his minority, be applied for his maintenance and support; and he thereby appointed his daughter, the Appellant, Mary Burnand, and John Dax, executrix and executor of his will.

The testator died in 1804, without having revoked or altered his will, leaving the Respondent, his only son, and the Appellant, Mary Burnand, his only daughter, and they were the only next of kin of the testator at his death.

The Appellant, Mary Burnand, alone proved the will, the other executor, John Dax, having declined to act in the executorship.

The testator at the time of his death was possessed of a very considerable personal estate, consisting among other things, of the lease of his Hotel, and the household goods and furniture, plate, linen, wine, liquors, and effects, in the same.

He did not before his death make any such trust assignment as in his will was mentioned, and upon his death, the Respondent and the Appellant, Mary Burnand, became entitled in equal shares by virtue of the will, to the clear residue of the testator's personal estate, after payment of his funeral and testamentary expenses, and his debts and the legacies.

At the date of the will the Respondent was a minor. His sister, the Appellant, Mary Burnand, who was several years older, upon the testator's death, as his executrix, possessed herself of the Hotel and all the property and effects in the same belonging to him at the time of his decease, and also possessed

herself of all other the personal estate and effects of the testator at the time of his death, and thereout paid all the debts owing from him at the time of his death, and his funeral and testamentary expenses and legacies.

The Appellant, Mary Burnand, for several years after the testator's death, with the acquiescence of the Respondent, continued to reside in the Hotel, and to carry on the business therein with the property and effects of the testator; but no settlement of accounts ever took place between the Appellant, Mary Burnand, and the Respondent, touching the business of such Hotel, and the gains and profits derived therefrom, or touching the personal estate and effects of the testator.

The Appellant, Mary Burnand, continued to carry on the business of the Hotel in King-street until the latter end of the year 1809, or the beginning of the year 1810, when the lease of the Hotel expired, and a renewal could not be obtained upon advantageous terms. She therefore, while the Respondent was in France, entered into a contract without his participation or concurrence, with Lady Downe and her son Mr. Dawney, for the purchase of the freehold and inheritance of a house in Clifford-street, for the purpose of carrying on the business of the Hotel. The Appellant, Mary Burnand, accordingly completed the purchase of the house in Clifford-street, and caused the same to be conveyed to herself in fee simple, and the purchase money was paid by her chiefly out of money arising from the gains and profits of the business of the Hotel in King-street, or out of money arising from the personal estate of the testator, or out of money which had been produced from the

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business of the Hotel carried on upon the premises in Clifford-street.

The Appellant, Mary Burnand, caused certain rooms to be built and added to the house in Clifford-street, and to be converted into and fitted up for baths, and also caused all the goods, furniture, property, wines, liquors, and effects, in the Hotel in King-street, to be removed into the Hotel in Clifford-street; and caused it to be completely furnished and fitted up in all respects for business as an Hotel, with accommodation for bathing. The purchase of the house in Clifford-street, and fitting up the same for business as an Hotel and for baths, amounted in the whole to several thousand pounds.

The Appellant, Mary Burnand, continued to carry on the business of the Hotel and baths, from 1809 until September, 1819, at the house in Clifford-street, and during that time occasionally advised with the Respondent as to such business, and he occasionally interfered therein, and conferred with her respecting the same, and she during that time received from the Respondent or his agents, considerable sums of money to be employed by her in the business, and the Respondent occasionally supplied wine for the business of the Hotel.

The business of the Hotel and baths in Clifford-street, during all the time before mentioned, was very profitable. But no account was at any time, prior to September, 1819, settled between the Respondent and the Appellant, Mary Nerot, relating to the business of the Hotels and baths, carried on in Clifford-street and King-street, or either of them, or relating to the personal estate of the testator; but the Respondent, at different times, received from the

Appellant, Mary Nerot, various sums of money on account of the business, and the profits arising from it.

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In 1819 the Appellant, Mary Nerot, intermarried with the Appellant, George Burnand, and he, as her husband, took possession of the Hotel and all the goods, furniture, wines, liquors, property, and effects in the Hotel, and the business was afterwards conducted by him and his wife.

In 1820 the Respondent filed his Bill in Chancery against the Appellants, which Bill was afterwards twice amended, and the Appellant, William Broughton Flexney, made a party defendant, the Appellant, Mary Burnand, having, antecedently to her marriage with George Burnand, conveyed the Hotel and premises to the Appellant, William Broughton Flexney, upon the trusts therein stated. The Bill, when amended, after stating the facts above mentioned, prayed that the deeds or instruments in writing, executed by George Burnand, and Mary his wife, as therein mentioned, so far as regarded one moiety of the freehold house and premises in Clifford-street, and half the property in the same, might be declared void as against the Respondent, and might be set aside; and that the co-partnership between the Appellant, Mary Burnand, and the Respondent, might be declared to have ceased on the marriage; that the same might be decreed to be dissolved; and that the dwelling-house and Hotel in Clifford-street, and the goodwill of the same, and all the goods, furniture, wines, liquors, property, and effects, in such house and Hotel, might be decreed to be sold and disposed of in such manner as the Court should direct; and that one moiety of the money arising therefrom might be declared to belong to the Respondent, and might be decreed to be paid

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to him accordingly ; and that the Appellants, George Burnand, and Mary his wife, might be decreed to come to a settlement of accounts with the Respondent, touching the several matters therein mentioned ; and that the necessary accounts might be decreed to be taken accordingly ; and that all accounts between the Respondent and the Appellants, George Burnand, and Mary his wife, touching the matters therein mentioned, might be settled in or under the direction of the Court ; and that what should appear on such settlement to be due or coming to the Respondent, might be decreed to be paid to him by the Appellants, George Burnand, and Mary his wife, or might be decreed to be paid out of their moiety of the money to arise from the said sale ; and that the Appellants, George Burnand, and Mary his wife, might be restrained by the order and injunction of the Court, from letting, or selling, or disposing of the said house and Hotel in Clifford-street, and from letting or disposing of the goodwill thereof, or any of the goods, furniture, wines, liquors, property, or effects in and about the same, or from removing or taking away any of such effects, and from receiving any monies on account of such Hotel or the business thereof ; and that some proper person might be appointed by the Court to manage and carry on the business of such Hotel, and to keep possession of such Hotel and all the effects therein, until the said sale ; and to receive all debts or sums of money due to the Appellant, Mary Burnand, and the Respondent, or either of them, or to the Appellant, George Burnand, in respect of such Hotel and the business. But if the Court should be of opinion that a partnership did not take place between the Appellant, Mary Burnand, and the Respondent in the Hotel business, then that

an account might be decreed to be taken of all the personal estate and effects of the Testator, and of his debts, funeral and testamentary expenses, and legacies; and also an account of the sums of money which the Respondent, James Nerot, since the death of the testator advanced to the Appellant, Mary Burnand, for the purposes of the trade or business, or otherwise, together with interest, and of the value of the wine supplied by the Respondent, as therein mentioned, to and for the purposes of the trade or business; and that under the circumstances therein mentioned, it might be declared that the Respondent was entitled to a moiety of the freehold house and premises in Clifford-street, and to half the property, effects, and things then in the same, and to half the gains and profits which had been derived and made by the Appellant, Mary Burnand, from carrying on the said trade or business in King-street and Clifford-street, since the death of the testator; and that it might be declared that the Respondent had a lien upon the freehold house and premises, and the property, effects, and things in the same, for what should be found due to him in respect of the moiety or share of the clear residue of the testator's personal estate and effects, after payment of his funeral and testamentary expenses and debts; and that the Appellants might be decreed to pay to the Respondent what, upon taking the said accounts, should be found due to him.

The Appellants, George Burnand, and Mary his wife, by their answer, admitted the will of the Testator, as stated in the Bill; that she and Respondent were his only next of kin; that she proved the will, and possessed the effects, including the Hotel, in which she continued to live and carry on the business until

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the expiration of the lease in 1809, and one year longer; that the business was carried on with the property of the testator left therein, and the monies of the Appellant, Mary Burnand; but she denied that it was so carried on for the joint benefit of her and the Respondent as co-partners, and contended that it was carried on for her sole, separate, and exclusive benefit.

The Appellants, George Burnand, and Mary his wife, by their answer further stated that the Appellant, Mary Burnand, and the Respondent, soon after the death of the testator, caused an inventory of the testator's property and effects to be made, and that they had several meetings together to consider and determine upon the mode of disposing of the same; and that it was agreed that the household furniture, plate, linen, and china, in or about the dwelling-house in King-street, and the lease for the unexpired term thereof, and the good-will of the trade, should be valued, and that the Appellant, Mary Burnand, should become the purchaser of the Respondent's moiety therein at such valuation; and that such valuation was accordingly made, and amounted to the sum of 2,366*l.*; that the Respondent appointed Mr. Harry Phillips, of Bond-street, to value, on his part; and that the Appellant, Mary Burnand, appointed Mr. Winstanley, of Paternoster-row, to value the same, on her part; and that in the month of June, 1804, the valuers proceeded to make, and did make, their valuation; and that she, the Appellant, in pursuance and execution of the agreement, paid or caused to be paid to the Respondent, or for his use, at various times, monies to the amount of 1,193*l.*, being the Respondent's full moiety of such valuation; and that she had at different times paid to the Respondent other sums of money,

and to an amount exceeding his proportion of the testator's residuary estate; that in the month of April, 1809, the freehold and inheritance of the hereditaments and premises in Clifford-street, where the business of the Hotel was then carried on, was conveyed to the Appellant, Mary Burnand; and that the money to pay for the same was raised by mortgage, which has since been paid off, and with the gains and profits of the business, which she had carried on for many years before in King-street, and afterwards in Clifford-street; and that the goods, furniture, property, and effects, which were in the hotel in King-street were removed to the hotel in Clifford-street. In a Schedule to their answer to the amended Bill the Appellants set forth an account of the sums of money alleged by the Appellant, Mary Burnand, to have been paid by her to the Respondent.

The Appellant, William Broughton Flexney, by his answer, stated that by an indenture of settlement, dated the 21st of August, 1809, and made antecedently to the marriage of the Appellants, George Burnand and Mary his wife, the Appellant, Mary Burnand, conveyed and assigned the freehold Hotel and premises in Clifford-street, and the furniture, goods, and effects in or about the same, to him, the Appellant, William Broughton Flexney, upon trust, with the consent of the Appellants, George Burnand and Mary his wife, to sell such premises, furniture, and effects, and to invest the money to arise from such sale in the public funds, or upon real securities, and to pay the annual produce thereof to the Appellant, Mary Burnand, for her separate use, for her life; and after her death to the Appellant, George Burnand, for his life; and after the death of the survivor of the Appellants, George Burnand, and Mary his wife, to

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pay the principal of such money to the child or children of the marriage of the Appellants, George Burnand, and Mary his wife, or their issue in manner therein mentioned, with a power to raise the sum of 1,200*l.* for the separate use of the Appellant, Mary Burnand.

There was no issue of the marriage of the Appellants, George Burnand, and Mary his wife.

Witnesses were examined on the part of the Respondent, and documentary or written evidence produced to shew that the Respondent and the Appellant, Mary Burnand, were, from the testator's death down to the marriage of the Appellants, George Burnand, and Mary his wife, jointly interested and partners in the business of the Hotel carried on in King-street and Clifford-street; and that the purchase of the house in Clifford-street was effected partly out of the partnership funds.

On the part of the Appellants, George Burnand, and Mary his wife, evidence was produced to shew an agreement on the part of the Respondent to sell his interest in the Hotel, furniture, and effects, to the Appellant, Mary Burnand, or to prove circumstances from which such agreement was to be inferred; and they gave in evidence a letter from the Respondent to the Appellant, Mary Burnand, dated at Paris, the 16th of August, 1810, wherein the Respondent appeared to treat the Hotel and the business as if he had no interest therein.

It was in evidence on the part of the Respondents, that at the time of writing such letter, the Respondent was in France, under his Majesty's licence, for the purpose of recovering and shipping British property for England; and it was suggested that any declaration or intimation on the part of the Respondent, that

he was in any manner connected with England, or had any property there, would have been attended with personal danger to the Respondent; and that all the Respondent's property in England was conveyed to other persons, and appeared to belong to such persons; and that all letters written by the Respondent while he was abroad were worded in a manner to prevent the French Government from knowing that the Respondent had any concerns, or interest, or property in England, which was then at war with France.

On the 5th of March, 1824, the cause came on to be heard before the Vice-Chancellor, and by the decree then made it was ordered that the parties should proceed to a trial at law in the Court of Common Pleas, on the issue, whether there was in the year 1804 an agreement for sale by the Respondent to the Appellant, Mary Burnand, of his share and interest in the goodwill, lease, stock in trade, and other property and effects, in the pleadings mentioned; and in case the jury should find that there was an agreement for such sale, then it was ordered that the parties should proceed to trial on the issue, whether the agreement was abandoned; and in the first of the issues the Appellants, George Burnand, and Mary his wife, were to be plaintiffs at law, and the Respondent to be defendant at law: and it was ordered that the Respondent and the Appellant, Mary Burnand, should be examined as witnesses upon the trial of the issues respectively; and the court reserved the consideration of all further directions, and of the costs until after the trial of the issues or issue.

The first issue was tried in the Court of Common Pleas by a special jury on the 6th of December, 1824, when a verdict was given for the Respondent.

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On the 23d of April, 1825, the cause came on to be heard before the then Vice-Chancellor of England, upon further directions, when it was ordered "that the Appellant, George Burnand, should pay unto the Respondent all costs attendant upon the said issue and the trial thereof; and the court declared, that the Hotel business carried on in King-street, Saint James's, and Clifford-street, Bond-street, under the name or designation of Nerot's Hotel, from the death of John Nerot, the Testator in the pleadings mentioned, until the 16th day of September, 1819, on which day the Appellants, George Burnand and Mary his wife intermarried together, was carried on by the Appellant, Mary Burnand, formerly Mary Nerot, spinster, in co-partnership with the Respondent, James Nerot, in equal shares and proportions, and that such partnership, on the 16th day of September, 1819, was dissolved; and that the freehold messuages and hereditaments in Clifford-street, and all and singular the household goods and furniture, plate, linen, china, and wine, stock-in-trade, implements, and all other property, effects, and things, being in or about the said messuage or premises, formed a part of the co-partnership property." The decree then proceeded to give the usual directions for sale and accounts.

The Appellants appealed to the Lord Chancellor of Great Britain, from this decree or decretal order of the Vice-Chancellor, pronounced on the hearing of the cause, for further directions.

The Appeal came on to be heard before the Lord Chancellor on the 22d of December, 1827, when his Lordship ordered, that the decretal order bearing date the 23d day of April, 1825, should be varied, by omitting the words following, viz. :—"And doth declare, that the freehold messuage and hereditaments

“ in Clifford-street aforesaid, and all and singular the  
 “ household goods and furniture, plate, linen, china,  
 “ and wine, stock in trade, implements, and all other  
 “ property, effects, and things, being in or about the  
 “ said messuages or premises, form a part of the co-  
 “ partnership property;” and inserting instead thereof,  
 the words following, viz. :—“ And doth declare, that  
 “ the freehold messuage and hereditaments in Clifford-  
 “ street aforesaid, and all and singular the household  
 “ goods and furniture, plate, linen, china, and wine,  
 “ stock in trade, implements, and all other property  
 “ and effects, which were in, upon, about, or belong-  
 “ ing to the said messuage and premises, and used  
 “ or employed in the trade or business of the Hotel  
 “ and baths there carried on, upon the 16th day of  
 “ September, 1819, the time of the dissolution of the  
 “ said partnership, formed part of the co-partnership  
 “ property;” and also by omitting the following  
 words, viz. :—“ And it is ordered, that the household  
 “ goods, furniture, plate, linen, china, stock in trade,  
 “ wines, and other effects, in and about the said pre-  
 “ mises, be also sold in such manner as the Master  
 “ shall direct, by a proper person to be appointed by  
 “ him;” and by inserting instead thereof, the words  
 following, viz. :—“ Let the Master take an account of  
 “ the household goods, furniture, plate, linen, china,  
 “ stock in trade, wines, and other effects, remaining  
 “ in and about and belonging to the said house and  
 “ premises in Clifford-street, and used or employed in  
 “ the trade or business of the Hotel and baths there  
 “ carried on upon the 16th day of September, 1819,  
 “ the time of the dissolution of the partnership, and let  
 “ him state the particulars of what the same consisted,  
 “ and the value thereof, at that time, and what part

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“thereof now remains in specie;” and the Master was to be at liberty to make a separate report thereof. And with such variations the said Order was affirmed.

From the Decree or Decretal Order of the 23d of April, 1825, pronounced by the then Vice-Chancellor; and from the Decree or Decretal Order of the 22d of December, 1827, pronounced by the then Lord Chancellor, the Appeal was presented.

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For the Appellants—*Mr. Sugden* and *Mr. Barber*.

For the Respondents—*Mr. Horne & Mr. Roupell*.

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18th July.

*The Lord Chancellor*.—I have heard this case to the end because I thought it my duty to do so, in consequence of its being an appeal from my own judgment. The question came first before the Vice-Chancellor: it was a question as to whether or not Mr. Nerot was a partner in the concern known by the name of Nerot's Hotel; the circumstances are of this description. It appears that this business was carried on by Mr. Nerot's father for a considerable number of years, and during the latter period of his life, it was conducted principally for Mr. Nerot by his daughter; it appears that about five or six years before the death of Mr. Nerot, he being desirous, I suppose, of retiring entirely from the business, made his will, and excepted this property from the dispositions contained in that will. The reasons why he excepted this property from the dispositions contained in the will, were these:—upon the face of the will he stated that it was his intention to assign the property for the joint benefit of his son and daughter, to a gentleman of the name of Dax, in consequence of an arrangement he had made with them, that during the remainder of his life

they should pay him a certain annuity. It appears, however, that he did not act immediately upon this agreement—he did not act upon it during his lifetime, and the result was that he made no alteration whatever in the dispositions contained in his will, and we are to infer therefore, I think, from the will itself, that it was his intention that his son and daughter should take a joint interest in this property. Now what took place immediately upon the death of Mr. Nerot? the daughter had conducted the business for her father in the name of Nerot's Hotel—she was several years older than her brother, and he appears to have had no disposition to implicate himself personally in the concern; the business therefore was carried on after the father's death, precisely as it was carried on during his lifetime by Miss Nerot, ostensibly in her name as Nerot's Hotel. It was a valuable property, and if, as it is contended, at the death of Mr. Nerot it became her property in consequence of her character as co-executrix, Mr. Nerot would of course be entitled to call for an account of it; and it is a most singular circumstance that it does not appear that during the long period of years which elapsed, any such account ever was taken; nor does it appear that she accounted for the profits of this concern to him at any period.

It appears that the defendant in this suit was very much pressed by the consideration of the circumstance of her never having settled her father's affairs, as far as relates to this concern, with Mr. Nerot, her brother; and upon the face of her answer, being called upon to account in consequence of the bill that was filed on her marriage with Mr. Burnand, she says, that shortly after her father's death, (and she states this upon her oath) an agreement was entered into, and that the agreement was of this description:—that the property was to be

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valued and appraised; she was to pay one half, she being jointly interested in it with her brother, and take the other half to herself. This is the defence she sets up upon the Record. Then in her answer she says, this business was not carried on between us as partners—it was carried on for my sole exclusive benefit. An arrangement was made between us soon after my father's death, by which it was stipulated that I should purchase this property. A valuation was made in pursuance of that agreement—I did purchase the property and paid you the valuation for your share. This is the answer she gave to this suit.

The case coming before the Vice-Chancellor in this shape, he directed issues on the application of the parties, and he allowed Mrs. Burnand in those issues every possible advantage, for he allowed her to be examined. She was on one side examined, and Mr. Nerot on the other: this being a family transaction, and many circumstances probably having occurred to which they alone were parties, it was of importance for the purpose of investigating the truth, that both of them should be examined before the jury. The issues were tried by a Special Jury in the Court of Common Pleas, before the Lord Chief Justice. The investigation was carried on with the utmost minuteness for a long period of time, and the result was, after hearing and judging of the examination of Mrs. Burnand on the one side, and Mr. Nerot on the other, that the Jury decided that no such agreement as that on which she insisted had been ever entered into between these parties. That was the main ground of defence which she set up to the suit of Mr. Nerot.

Now then, look at the probabilities of the case, for we are to look at the case on the footing of probability. They were jointly interested in this valuable

concern—no agreement was made by Mr. Nerot to part with that interest. The business was carried on in the same form and manner in which it had been carried on during the father's lifetime; and no settlement of accounts having been, as it is said, ever called for by Mr. Nerot, it is supposed that Mr. Nerot had abandoned all interest in this concern, except, as it stood on the footing in which it was placed at the period of the father's death, namely, according to the valuation then taken. The story is in itself most improbable; it is not likely that Mr. Nerot should have abandoned his interest in this concern, without some valuable consideration; and there is no evidence whatever for the purpose of shewing that he did do it. An attempt was made to prove an agreement of that description, and that attempt entirely failed. But the question does not rest upon presumption; a witness has been examined in the cause, to whose deposition I will refer, and that witness was examined at the trial, which is a most material circumstance, because it obviates all objection to his credit. He was examined and cross-examined upon the trial, and the verdict must have proceeded principally on the reliance the jury placed on his testimony. Indeed, I may say, that if it is impossible they could have found the verdict they ultimately pronounced unless they believed the testimony of Mr. Cary, and if the testimony of Mr. Cary is to be believed, there is absolutely an end to the case. In the first place I say, it is highly improbable, that Mr. Nerot should have abandoned his interest in this concern unless some arrangement of that kind had been entered into between the parties, and he had received an equivalent for it; and not only is there no evidence of such an agreement being entered

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into, but being insisted on, it is negatived by the Jury.

The probabilities are, therefore, all against the presumption of Mr. Nerot's having entered into such an agreement. But what is the result of the positive evidence? Mr. Cary says, "I was employed by Mr. Nerot as his agent, from time to time, to inspect the accounts. I was well acquainted with both parties. I had interviews with Mrs. Burnand from time to time, and she over and over again declared that the business was carried on for the joint benefit of herself and her brother." If Mr. Cary is to be believed in the statement he thus makes, (and the jury believed his statement upon the occasion to which I am referring), is it not obvious that there is at once an end to this cause? If the business was carried on for the joint benefit of these parties, it is perfectly clear they were partners in the business so carried on. The business, under these circumstances, could not have been carried on for their joint benefit unless they were partners in the concern. He does not state that on one occasion alone, but he repeats this over and over again at different periods of his evidence, and his evidence is irreconcilable with any other supposition. He says, "I was directed to investigate the accounts from time to time;" and as he acted upon these directions he waited on Mrs. Burnand. The accounts were produced to him, he was dissatisfied with the manner in which they were kept—he remonstrated with her. In the first instance she stated that she could not make that particular account more perfect, but she said, "my brother has nothing to complain of, for I have made no purse for myself." If that account be true, it is quite obvious that at that particular time she consi-

dered that he had an equal interest in the concern with herself. At subsequent times, he says, she repeatedly declared to him when he was examining and investigating the accounts, that the business was carried on for their joint interest and joint benefit. This goes down to a late period. It is supposed some settlement of account had taken place between these parties; that money had been paid, and that Mr. Nerot had no claim whatever on Mrs. Burnand. It appears that the last time these accounts were investigated, was in the year 1816, six years after the period when the business was transferred to the house in Clifford Street. I do really think, therefore, it is impossible, if you are disposed to place reliance on the testimony of Mr. Cary—if you believe him to be a witness of truth, that you can come to any other conclusion than that they were partners in the transaction.

I again advert to a circumstance which I think most material; that Mr. Cary is not here merely giving evidence in the shape of depositions, but with respect to the substance of the evidence he has given in the shape of depositions, he has been examined *vivâ voce* in the presence of a Jury, and the Jury have pronounced on the degree of credit to which he is entitled. Now how is this evidence met? I admit that it is met in the first instance by the evidence of Mr. Tetsall. Mr. Tetsall says, "I conducted this business, or managed this business on the part of Mrs. Burnand." He was the head waiter, I believe, in the concern; he kept the accounts and superintended the business, but there is nothing in the evidence of Tetsall inconsistent with the evidence of Mr. Cary. It does not appear that Mr. Nerot ever intended publicly to declare himself a partner in this

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business. The business was always carried on under the name of Nerot's Hotel. Mr. Nerot's particular pursuits were of a different description; he never interfered in the management of the Hotel, and there was, therefore, no reason why Tetsall, who was a waiter, should know that Mr. Nerot was a partner. The evidence of Mr. Cary, therefore, is perfectly reconcileable with that of Mr. Tetsall.

But I do admit that the case is considerably, in point of evidence and effect, assailed by the letter to which so much reference has been made in the progress of this cause. In the early stages of it I read and considered that letter over and over again, and considered the explanations which were given to it, and I confess it was a long time before I could satisfy my mind, taking the whole case together, that this evidence was such as to outweigh the inferences to be drawn from that letter. But I considered this circumstance which I think material, and which has been hinted at at the bar—the letter was most material evidence in the case before the Jury. The question before the Jury was this: was there an agreement entered into and executed, by which Mr. Nerot parted with his interest in the concern? That was the question at issue before the Jury;—to impeach that it was most material to produce this letter, in which he called this property her's. And those arguments which have been raised in this instance, were raised before the Jury, and were considered by the Jury. They were investigated, sifted, and examined by the Judge, and the result of the whole was, that notwithstanding that letter, the Jury found a verdict negating the fact of such an agreement. I conceive, that under the circumstances the letter has with reference to the substantial question which you are now considering

been weighed, sifted, and examined by the Jury ; and I think, taking the case altogether, whatever suspicions that letter may raise in my mind, and whether or not I am perfectly satisfied with the explanation given in respect to it,—taking the whole case together, I think the balance of evidence is so strong in favour of the Respondent, that I am bound to consider that a partnership has existed between the parties.

I admit there is evidence on both sides, and in the earlier stage of this inquiry, perhaps before the Vice-Chancellor, if I had been sitting in that court, and I had been asked to direct an issue, for the purpose of trying the question concerning partnership, I should, without hesitation, have acceded to that proposition, and directed it ; but the parties never requested an issue to try the question of partnership, which it was competent for them to ask for. When the case afterwards came before Lord Eldon, and was there examined, sifted, and discussed, they never requested an issue for the purpose of trying that question. The question afterwards came before me, and was again examined and discussed at a considerable length, but the parties never, during any of those discussions, requested such issue.\* Thinking, and indeed being satisfied, as I am, that the balance of evidence is strong in favour of a partnership, I cannot recommend to you in this last stage of the cause, to direct an issue for the purpose of commencing again, as it were, the investigation and trial of a case which has already lasted so many years.

Having paid great attention to the evidence, (and it is a question of fact), I recommend to you, under these

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\* See the *dictum* of Lord Redesdale in *M'Neill v. Cahill*. 2 Bli. (1st Ser.) p. 261.

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circumstances, to find that a partnership has been sufficiently established. If a partnership has been sufficiently established, the next question is as to the house in Clifford Street. It appears to me that it must follow the fate of the other question; because, looking to the evidence of Mr. Cary as to sums of money advanced, looking to the answer and the manner in which that answer is sworn as to the fund out of which the purchase money was paid, it is quite impossible not to come to the conclusion that it was out of the proceeds of that concern this house was purchased;—it was purchased out of the proceeds of the concern for the purpose of the concern, in order to carry on the business of the partnership; and if this lady has herself paid more than her share of the purchase money, she will have the benefit of that in taking the account; but being purchased for the purpose of carrying on the concern, in consequence of the expiration of the former lease, the establishment having been removed into that house, the furniture and stock having been all taken there, that house having been employed for the purpose of the trade, Mr. Nerot, having, during the progress of the negotiation advanced money for the purpose of completing the purchase; and the purchase having been paid for principally out of the proceeds of the concern; if the concern is to be treated as a partnership concern, this house also must be considered partnership property. Under these circumstances, I should humbly recommend to you that the Decree in the Court below be affirmed; and I think it ought to be affirmed with 100*l.* costs.

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Judgment Affirmed, with 100*l.* costs.

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## IRELAND.

(COURT OF CHANCERY.)

The Right Honourable HENRY AUGUSTUS, LORD VISCOUNT DILLON, } *Appellants.*  
and CHARLES BUTLER, Esq. - - }

WILLIAM PLASKETT and JAMES } *Respondents.*  
BRETT - - - - - }

D. having an estate for life in lands, situate in England and Ireland, assigned them, together with his furniture, &c., by several indentures, to Trustees for a term of 99 years, if he should so long live, in trust, out of the rents and profits, after satisfaction of a jointure, prior to the life estate and the interest of a mortgage, and certain annuities created by the Appellant, to pay to the Appellant an annuity of 5,000*l.*, and to his creditors by bond, judgment, and simple contract, (parties to the deed of assignment), interest at the rate of 5*l.* per cent. upon their respective debts; and to apply the surplus from time to time in the gradual extinction of the capital of the debts.

The creditors generally executed the deed of trust and assignment, by which they covenanted not to sue the Appellant. But P. and B., creditors of D., by simple contract, having obtained judgment for their debts, first in England and afterwards in Ireland, sued out a writ of *fiery facias*, directed to the Sheriff of the county of R. in Ireland, who seized the goods of D., but refused to sell them, in consequence of a claim made by the Trustees to whom they had been assigned by D. Whereupon P. and B., in 1820, filed a Bill in Chancery in Ireland, on behalf of themselves and other creditors of D., which stated these facts; and, setting forth, in part, the deed of trust and assignment as it appeared in the registry; but, alleging that they were ignorant of the trusts, prayed that the Defendants might set forth the deed, and that the creditors might have power to elect to take the benefit of the deed; or otherwise, that it might be declared fraudulent and void as to them, and that in the meantime a receiver of the rents might be appointed, and that they might be applied in

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payment of the debts. After the bill was filed two of the trustees died, and two new trustees were appointed. D. and the surviving trustee put in their answers.

In 1824 P. and B. filed a supplemental bill against D., and the surviving trustee, stating the deed of assignment and trust; that under it D. was entitled to a rent charge issuing out of the lands held in trust by the surviving trustee, and that they had sued out an *elegit* against D. for the sum of 1,027*l.*, directed to the Sheriff of R., who returned that D. or his trustee was seised of a freehold rent issuing out of lands in the county of R.; one moiety of which he had delivered to P. and B. to hold, &c., till they had levied the damages marked on the writ. They claimed by the bill to be entitled either to a moiety of the lands or of the rent charge, or to have satisfaction of their judgment out of the annuity payable to D. under the trusts of the deed. Upon these grounds they prayed by their bill a receiver either of a moiety of the lands comprised in the Sheriff's return to the writ, to the extent of one moiety of the 5,000*l.* per annum, or of the lands comprised in the deeds of assignment and trust; and after satisfaction of the charges having priority according to the trusts of the deed, that a moiety or a competent part of the 5,000*l.* per annum might be applied in payment of their demand, and that the trustee might be restrained from paying the annuity to D. till the demand was satisfied.

After the filing of the bill two orders were made, one for the appointment of a receiver, the other restraining the trustee from paying the annuity to D., to the amount of 1,260*l.* The trustee, by his answer, suggested that his co-trustees and the creditors of D. were necessary parties to the suit. D., by his answer, insisted upon the validity of the deed and priority of the trusts, (including his own annuity), over the judgment of P. and B. As soon as the answers were filed, applications were made to the Master of the Rolls on the part of D., to discharge the receiver and rescind the injunction; and on the part of P. and B. to continue the receiver and injunction till the hearing, which was granted, and the motion of D. was refused; and this decision was affirmed on appeal to the Lord Chancellor of Ireland.

Held affirming the judgments of the courts below, that under the circumstances above stated, the orders appointing a receiver, and restraining the surviving trustee from paying the annuity to D., were properly made; that it was not necessary

for this purpose that the prior incumbrancers, nor the creditors, parties to the deed of trust, nor the substituted trustees, should be parties to the suit. Held, also, that the defects in the Sheriff's return to the *elegit* were immaterial, as no return is necessary, and the suing out an *elegit* is sufficient to ground the equity. Held, further, that one *elegit* is sufficient, although the rent was payable out of lands in three counties.

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BY an Indenture bearing date the 4th of July, 1815, and made between the Appellant the Viscount Dillon, of the first part; the several persons whose names and additions were written in the first schedule to the indenture, creditors of Viscount Dillon, by jointure, rent-charge, or annuity, of the second part; the several persons, whose names and additions were written in the second schedule to the indenture, creditors of Viscount Dillon, by bond and judgment, or by one of such securities, of the third part; the several persons whose names and additions were set forth in the third schedule to the indenture, creditors of Viscount Dillon by simple contract, of the fourth part; and the Appellant Charles Butler, and Edward Jerningham, and John Hosier, deceased, on the fifth part: After reciting, that by virtue of indentures of lease and re-lease, bearing date respectively the 13th and 14th of July, 1803; and in consequence of the subsequent decease of Charles Viscount Dillon, the Appellant Viscount Dillon, was seised or entitled, during the term of his life, without impeachment of waste, and with several remainders over in strict settlement, and with various special powers and authorities, of or to several manors, capital and other messuages, lands, tenements, and other hereditaments, situate in the county of Oxford; and of or to several castles, manors, messuages, lands, tenements,

and other settlements, situate in the counties of Mayo, Roscommon, and Westmeath, in Ireland; but that some of the said estates as were situate in Ireland were subject to a rent-charge of 2,000*l.* by the said indenture of release and settlement, limited to Mrs. Catherine Devagher Dillon, and her assigns, for her life, and to the powers and remedies thereby given, and to a term of 200 years thereby created, for securing payment thereof; and further reciting that the Appellant Viscount Dillon had charged, or otherwise secured upon the English and Irish estates, or some of them, several annuities payable during his life, or during terms of years determinable on his death, and the amount of each of the said annuities, and the name or names of the person or persons to whom the same were payable were set forth in the first schedule thereto annexed; and that the Appellant Viscount Dillon was indebted to different persons, or some of them, in judgment, or both such securities, or considerable sums of money, and the same, or a considerable part thereof, were set forth in the second schedule thereto annexed; and that he was also indebted to several other persons by simple contract in various other sums of money, and that the same, or the principal part thereof, were set forth in the third schedule thereto annexed: And that in order to provide for the discharge of the said several annuities and debts, and for the subsistence of the Appellant Viscount Dillon, and the management of his affairs in the interim, it had been agreed between the several parties thereto, that the Appellant Viscount Dillon should grant and demise the lands in Ireland and England, of which, under the indentures of the 13th and 14th of July, 1803, he was tenant for life, but subject to the several charges and incum-

brances affecting the same estates, or any of them, unto Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, or assigns, for the term of ninety-nine years, if the Appellant Viscount Dillon should so long live, upon the trusts and subject to the powers, provisoes, and agreements thereafter expressed: And that he should assign all his household goods and furniture in his mansion house at Ditchley, in the county of Oxford, and at Loughglyn in Ireland, unto Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, and assigns, upon the trusts, and subject to the powers, provisoes, agreements, and declarations thereafter contained: And also that the Appellant Viscount Dillon should effect one or more insurance or insurances on his own life for the sum of 15,000*l.*, or for several sums of money amounting in the whole to that sum; and that the said policy or policies should be taken in the name of Viscount Dillon, and assigned by him to Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, and assigns, upon such trusts as are thereafter expressed: And that in consideration of the provisions so to be made by Viscount Dillon for the payment of debts owing by him to the parties thereto of the third and fourth parts respectively, they should enter into the covenants and agreements thereafter contained, and that in pursuance of the said agreements, Viscount Dillon had effected such insurances: And that by an indenture bearing even date, and made between Viscount Dillon of the one part, and Charles Butler, Edward Jerningham, and John Hosier of the other part, Viscount Dillon had granted and demised unto Charles Butler, Edward Jerningham, and John

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and other hereditaments, situate in the counties of Mayo, Roscommon, and Westmeath, in Ireland; but that such of the said estates as were situate in Ireland were subject to a rent-charge of 2,000*l.* by the said indenture of release and settlement, limited to Mary Viscountess Dowager Dillon, and her assigns, for her life, and to the powers and remedies thereby given, and to a term of 200 years thereby created, for enforcing payment thereof; and further reciting that the Appellant Viscount Dillon had charged, or otherwise secured upon the English and Irish estates, or some of them, divers annuities payable during his life, or during terms of years determinable on his decease, and the amount of each of the said annuities, and the name or names of the person or persons to whom the same were payable were set forth in the first schedule thereto annexed; and that the Appellant Viscount Dillon was indebted to different persons by bond or judgment, or both such securities, in considerable sums of money, and the same, or a principal part thereof, were set forth in the second schedule thereunto annexed; and that he was also indebted to several other persons by simple contract in various other sums of money, and that the same, or the principal part thereof, were set forth in the third schedule thereto annexed: And that in order to provide for the discharge of the said several annuities and debts, and for the subsistence of the Appellant Viscount Dillon, and the management of his affairs in the interim, it had been agreed between the several parties thereto, that the Appellant Viscount Dillon should grant and demise the lands in Ireland and England, of which, under the indentures of the 13th and 14th of July, 1803, he was tenant for life, but subject to the several charges and incum-

brances affecting the same estates, or any of them, unto Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, or assigns, for the term of ninety-nine years, if the Appellant Viscount Dillon should so long live, upon the trusts and subject to the powers, provisoes, and agreements thereafter expressed: And that he should assign all his household goods and furniture in his mansion house at Ditchley, in the county of Oxford, and at Loughglyn in Ireland, unto Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, and assigns, upon the trusts, and subject to the powers, provisoes, agreements, and declarations thereafter contained: And also that the Appellant Viscount Dillon should effect one or more insurance or insurances on his own life for the sum of 15,000*l.*, or for several sums of money amounting in the whole to that sum; and that the said policy or policies should be taken in the name of Viscount Dillon, and assigned by him to Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, and assigns, upon such trusts as are thereafter expressed: And that in consideration of the provisions so to be made by Viscount Dillon for the payment of debts owing by him to the parties thereto of the third and fourth parts respectively, they should enter into the covenants and agreements thereafter contained, and that in pursuance of the said agreements, Viscount Dillon had effected such insurances: And that by an indenture bearing even date, and made between Viscount Dillon of the one part, and Charles Butler, Edward Jerningham, and John Hosier of the other part, Viscount Dillon had granted and demised unto Charles Butler, Edward Jerningham, and John

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Hosier, their executors, administrators, and assigns, all and every the freehold castles, baronies, manors, farms, towns, rents, messuages, mills, lands, tenements, tithes and hereditaments, situate, arising, and being in the counties of Mayo, Roscommon, and Westmeath, and in the baronies of Costello and Boyle, in Ireland, and therein particularly mentioned and set forth, with their respective rents and profits, in the schedule written under or annexed to the said indenture; and all other the castles, baronies, manors, messuages, lands and other hereditaments whatsoever, situate and being in the said counties, or any of them, or elsewhere in Ireland, which he the said Viscount Dillon, or any person or persons in trust for him, or for his use, was or were seised of or entitled to for the term of his life, or for any other estate of freehold, or right or interest whatsoever, in possession, reversion, remainder, use, trust, or expectancy, under or by virtue of the said indentures of lease and release, or otherwise, to hold the same, (subject and charged as therein mentioned, and also subject and without prejudice to the powers by the said indentures of release and settlement created and in anywise relating, annexed, or collateral to the life estate or interest thereby limited to Viscount Dillon, in the said hereditaments, and to the uses, trusts, and charges to be created by an exercise of the said powers, or any of them), unto Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, and assigns, from thenceforth for the term of ninety-nine years, if Viscount Dillon should so long live, without impeachment of waste, upon such trusts, and subject to such powers, provisoes, declarations, and agreements as should be expressed concerning the same, in an indenture

therein mentioned, to be then already prepared and engrossed, and to be intended to bear even date with the same, and to be made between the persons therein named, being the same persons as are parties to the indenture now in recital: And that by the said indenture the Appellant Viscount Dillon, in further pursuance of his said agreement, assigned to Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators and assigns, all and singular the household goods, furniture, plate, linen and china of him the said Henry Augustus Viscount Dillon, then being in or about his capital messuage or mansion house at Loughglyn (being part of the estates thereinbefore demised), to hold the same unto Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, and assigns, upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, agreements, and declarations, as were or should be expressed or contained of or concerning the same, in and by the said indenture thereinbefore mentioned, to be then already prepared and engrossed, and to bear even date with the same; It is by the indenture now in recital witnessed, that in pursuance of the said recited agreement with respect to the demise agreed to be made of the said Oxfordshire estates thereafter mentioned, and in consideration of the covenant and agreement thereafter entered into by the parties to the indenture now in recital of the third and fourth parts, and for the nominal consideration therein mentioned, the Appellant Viscount Dillon granted and demised unto Charles Butler, Edward Jerningham, and John Hosier, their executors, and administrators, all and every the manors, farms, capital and other messuages

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mills, lands, tenements, tithes, and hereditaments, situate, arising, and being in the county of Oxford, or elsewhere in England, of or to which he, Viscount Dillon, or any persons in trust for him, were seised or entitled for the term of his life, or for any other estate of freehold or right or interest whatsoever, in possession, reversion, remainder, use, trust, or expectancy, under the said recited indentures of lease and re-lease as aforesaid, or otherwise, and which, or the principal parts whereof, were in the same indentures, or one of them, particularly described and set forth, with their appurtenances; to hold the same, subject and charged as thereinbefore is mentioned, and subject and without prejudice to the powers by the said indentures of re-lease and settlement, created, and in any wise annexed or collateral to the life estate and interest thereby limited to Viscount Dillon, and to the uses, trusts, or charges to be created by an exercise of the said powers, or any of them, unto Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, and assigns, from the day next before the day of the date thereof, for and during and unto the full end and term of ninety-nine years from thenceforth next ensuing, if Viscount Dillon should so long live, without impeachment of waste; upon the trusts, and subject to the powers, provisoes, agreements, and declarations thereafter expressed: And it is further witnessed that for the considerations aforesaid, and in further pursuance of the said agreement, the Appellant Viscount Dillon bargained and set over unto Charles Butler, Edward Jerningham, and John Hosier, their executors and administrators, the household goods, furniture, plate, books, pictures, engravings, drawings, statues, linen and china, and other articles for

household use or ornament, then being in or about his mansion house at Ditchley in the county of Oxford; to hold the same unto Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, and assigns, from thenceforth as fully and effectually as Viscount Dillon, his executors, administrators, or assigns could or might have otherwise had or been entitled to the same; but upon the trusts, and subject to the powers, provisoes, and agreements thereafter declared; (that is to say) upon trust, that Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, and assigns, should forthwith enter into the possession and receipt of the rents and profits of the said several mansion houses, manors, farms, messuages, lands, tithes, hereditaments, furniture, and other the premises so severally demised and assigned as aforesaid; and should, during the continuance of the trusts thereafter declared for the payment of the said debts, remain in such possession and receipt, and in the management of the said estates, and every of them, by means of such agents and receivers as thereafter mentioned: And it was thereby agreed and declared, that Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators and assigns, should from time to time apply the rents, issues, and profits of the mansions, manors, farms, messuages, lands, tithes, and other premises, so thereby and by the said indenture of equal date, therewith respectively demised, when and as the same should become due, and be actually received by them upon the trusts following; (that is to say,) in the first place to discharge thereout all taxes, rates, and assessments imposed and to be imposed upon the premises, and

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the expenses of putting and keeping in repair the several mansion houses and other buildings thereon, and the wages and board of proper servants for taking care of the said mansions and the furniture therein, and also the reasonable salaries and allowances of the agents and receivers of the Irish and English estates; and likewise all expenses attending the execution of the trusts thereby declared, and for keeping and auditing the accounts, and paying the annual interest and other charges, and in preparing and engrossing deeds relative to the trusts intended to be thereby created; and in the second place, or if it should be so required by Mary, Viscountess Dillon, her executors, administrators, or assigns, prior to such of the foregoing purposes as respect the charges or debts subsequent in legal or equitable precedence to the jointure rent-charge of Mary, Viscountess Dillon, should by and out of the rents, issues, and profits of the estates in Ireland, pay to Mary, Viscountess Dillon, and her assigns, during so many years of the term of ninety-nine years, determinable as aforesaid, as she should happen to live, the said rent-charge of 2,000*l.* of lawful British money, provided for her by the indenture of the 14th of July, 1803, as thereby appointed; and, in the third place, should (but as to such of the premises in the county of Oxford as are charged with the therein-after mentioned mortgage debt of 4,500*l.* subject to the trusts thereafter expressed of and concerning the said sum of 4,500*l.*, and the interest thereof,) by and out of the rents, issues, and profits of the manors and other the premises, by the indenture now in recital, and the indenture of equal date, pay to the several persons for the time being entitled to receive the same, as well the several annuities set forth in

the first schedule thereto annexed, with such addition to each as might be occasioned by any extra insurance, to be paid by each for extra risk of the Appellant Viscount Dillon at sea, or his residing out of the kingdom, as also any annuity or annuities which might be granted by Charles Butler, Edward Jer-ningham, and John Hosier, their executors, adminis-trators, or assigns, together with the Appellant Vis-count Dillon, under the power thereafter for that purpose contained : and likewise should, by such rents, issues, and profits, of the allotments or parcels of land and hereditaments already charged with the said sum of 4,500*l.*, pay, or cause to be paid, according to the pri-ority of security, to Richard Phillips, his executors, administrators, and assigns, the yearly interest of the sum of 4,500*l.*, raised by way of mortgage, by Charles Viscount Dillon, the father of the Appellant Viscount Dillon, under the powers of an Act of Parliament passed for dividing and enclosing the open fields and common and waste lands in Spelsbury, in the county of Oxford, and secured on such of the premises thereby demised, as were allotted or otherwise af-fected by the said Act ; and, in the fourth place, should, by and out of the rents, issues, and profits of the said several hereditaments, (but subject as afore-said,) pay the yearly premiums to become payable upon, and all other expenses which might attend the policies of insurance, effected or to be effected in the name of the Appellant Viscount Dillon, and by him assigned or intended to be assigned to Charles Butler, Edward Jerningham, and John Hosier, and particu-larly the annual premium on a separate insurance of 8,000*l.*, made or to be made on the life of the Appellant Viscount Dillon, for the benefit of the persons therein mentioned ; and, in the fifth place, should, out of the

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rents, issues, and profits of the hereditaments and premises thereby, and by the indenture of equal date therewith demised, (but subject as aforesaid,) pay to the Appellant Viscount Dillon, and his assigns, during the term of ninety-nine years, determinable as aforesaid, an annuity of 5,000*l.* of British money, in such manner as therein mentioned; and should, by and out of the said last-mentioned rents, issues, and profits, pay to the several persons, parties thereto, of the third and fourth parts respectively, being creditors of the Appellant Viscount Dillon, by bond and judgment, or by one of such securities, and by simple contract respectively, and their several executors, administrators, and assigns, interest at the rate of 5*l.* per cent. per annum upon their respective debts and demands set forth in the second and third schedules thereto annexed, or upon so much thereof respectively as should from time to time remain due and unpaid, with interest, to be paid as therein mentioned; and, in the sixth place, when the clear residue of the rents, issues, and profits of the manors, farms, messuages, lands, tithes, and other premises demised by the indenture now in recital, and the indenture of equal date therewith, which should remain after answering the several purposes aforesaid, should amount to the sum of 2*s.* 6*d.* in the pound of or upon the respective debts and demands of the several persons, parties thereto, of the third and fourth parts respectively, should apply such surplus rents, issues, and profits among the several persons, parties thereto, of the third and fourth parts respectively, or the several executors, administrators, or assigns, in proportion, and according to their several debts and demands set opposite their respective names in the said second and third schedules thereto annexed, in and towards the

discharge thereof, regard being had only to the quantity thereof, and not to the priority of time of, or the nature of the securities for the same, or any other circumstance of preference; and afterwards, from time to time, to apply the future residue or surplus of the rents, issues, and profits, when, and as often as the same should amount, after answering the several purposes aforesaid, to the sum of 2s. 6d. in the pound, of or upon the last-mentioned several debts and demands, in and towards the discharge thereof, in like manner until the same should thereby or otherwise be wholly discharged, or the Appellant Viscount Dillon should depart this life; reserving, however, upon the first, or any other distribution, the dividends which might belong to any disputed debts or demands until the same should be ascertained as thereafter directed; and lastly, should stand and be possessed of and interested in the ultimate residue or surplus, if any, of the rents, issues, and profits which should remain, after making the several payments and answering the several purposes thereinbefore directed and declared; and also of and in the said manors, farms, messuages, lands, tithes, and other premises demised, or intended so to be, by the indenture now in recital, and the indenture of equal date therewith, and every part thereof, when and as soon as the several trusts thereinbefore declared, should be fully performed, in trust for the Appellant Viscount Dillon, his executors, administrators, and assigns respectively: And it was thereby agreed and declared, that Charles Butler, Edward Jerningham and John Hosier, their executors, administrators, and assigns, should stand and be possessed of and interested in the monies to become payable, and be received upon or under the several policies of insu-

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rance effected or to be effected in the name, by and at the costs of Viscount Dillon; and also of and in all and every the rent, and arrears of rent, which might be due and owing at the time of his decease, upon the trusts following; (that is to say) in the first place, to pay in equal order and degree, the several debts and demands of the respective persons parties thereto of the third and fourth parts, being creditors of Viscount Dillon, by judgment bond and simple contract, and set opposite their respective names in the second and third schedules thereto annexed, or so much thereof as should remain unpaid at the death of Viscount Dillon; and as such last-mentioned monies, if insufficient to discharge the whole, would extend and be able to satisfy, together with all interest due thereon; and after full payment of such last-mentioned debts and demands and interest, in case there should then remain any residue of the monies to become payable and be received upon the aforesaid policies of insurance, to pay the same to the executors, administrators, or assigns of Viscount Dillon, as part of his personal estate; or else, if all the several debts and other purposes thereby provided for, should be discharged and satisfied in his lifetime, then to assign the policies of insurance, and the monies to become payable thereon, to Viscount Dillon, or his assigns, or as he or they should direct, for his or their own benefit: And as to the goods, furniture, linen, china, and other articles at Ditchley, thereinbefore assigned to Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, and assigns, it was thereby further agreed and declared, that it should be lawful for Charles Butler, Edward Jerningham, and John Hosier, and the survivors, &c. by any deed, &c. to demise, or to contract or agree to demise, the said goods, fur-

ture, and other the articles, &c. to any person to whom they or he should let the mansion house at Ditchley, for the term or time for which the mansion at Ditchley should be letten, and to be held and go along with the same, at such rent, under such covenants and agreements, as Charles Butler, Edward Jerningham, and John Hosier, or the survivors, &c. should deem advisable: And it was thereby further agreed and declared between and by the parties to the indenture now in recital, that the rents to be received by Charles Butler, Edward Jerningham, and John Hosier, or the survivors, &c. from any lease to be executed by them or him under the power therein contained, should be applied upon such trusts and in such manner as is thereinbefore expressed, for the application of the rents, issues, and profits of the premises thereby demised: And it was thereby agreed and declared, that Charles Butler, Edward Jerningham, and John Hosier, their executors, administrators, and assigns, should stand and be possessed of and interested in the household goods, furniture, and other premises in the mansion house at Loughglyn upon trust, that they, &c. should permit the then present or any future agent or receiver of the Irish estates who should reside in the house at Loughglyn, to have the use of the said household goods, furniture, plate, linen, and other premises, together and along with the mansion house, and its appurtenances, at Loughglyn, in part of the salary of his service: And it was by the said indenture further witnessed, that in consideration of the premises, each of the several persons, parties thereto, of the third and fourth parts, so far only as related to the acts or deeds to be done by himself or herself, and his or her heirs, executors, administrators, or assigns, and not further or other-

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wise, did thereby for himself and herself respectively, and for his and her respective heirs, executors, and administrators, covenant and agree with the Appellant Viscount Dillon, his heirs, executors, and administrators, in manner following; (that is to say) that they the creditors, parties thereto, and their respective co-partners, executors, or administrators, should not at any time or times thereafter, while the indenture now in recital should remain in full force and effect, and the trusts thereof should be duly performed, commence or institute or prosecute any action or suit, either at law or in equity against Viscount Dillon, in relation to any of the debts or demands respectively set forth in the second and third schedules thereto annexed, or take or sue out execution or sequestration against, or do or cause to be done any act, matter, or thing whatsoever, whereby or by means whereof the goods, chattels, or other personal estate or effects of Viscount Dillon, his heirs, executors, or administrators, in Ireland, England, or elsewhere, or his or their lands or tenements should be seized, detained, or taken in execution, for or in respect of any debt or debts whatsoever, then due or owing unto them, or any of them, from Viscount Dillon; and moreover that they, or their respective executors or administrators, should, when and as the several debts or sums of money payable and owing respectively to them by Viscount Dillon, and set opposite their respective names in the second and third schedules thereto annexed, together with such interest and costs as thereinbefore are mentioned, should be by the means aforesaid; or otherwise, fully paid and satisfied, or should have ceased and be no longer payable, at the request, costs, and charges of the Appellant Viscount Dillon, his heirs, executors, or administrators, make, give, sign, or exe-

cute unto him or them, good and sufficient releases, acquittances, and discharges, for the several debts then payable and owing to them the same several creditors respectively by Viscount Dillon as aforesaid, and of and from all actions, suits, costs, charges, claims, and demands whatsoever in respect thereof; and there is contained in the indenture now in recital the usual provision for the appointment of new trustees by the said Viscount Dillon, with the approbation of the surviving or continuing trustees or trustee in the said indenture mentioned.

By an indenture bearing date the 4th day of July, 1815, (being the indenture referred to in the indenture hereinbefore stated) and made or expressed to be made between the Appellant Viscount Dillon, of the one part; and the Appellant Charles Butler, and the said Edward Jerningham and John Hosier, of the other part; after reciting, that the Appellant Viscount Dillon was entitled for life, without impeachment of waste, to several castles, manors, lands, tenements, and hereditaments in the counties of Mayo, Roscommon, and Westmeath, in Ireland, subject as therein and hereinbefore is mentioned; and that he, for the considerations set forth in the hereinbefore stated indenture, had agreed to demise the said estates to the Appellant Charles Butler, and to the said Edward Jerningham and John Hosier, their executors, administrators, and assigns, for ninety-nine years, if he should so long live, and to assign to them the household goods and furniture at Loughglyn House, upon the trusts thereafter mentioned concerning the same, it was witnessed, that for the considerations therein mentioned Viscount Dillon demised unto Charles Butler, Edward Jerningham, and John Hosier, their executors, adminis-

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trators, and assigns, all his estates in the counties of Mayo, Roscommon, and Westmeath, for ninety-nine years, if he should so long live, without impeachment of waste, upon the trusts declared concerning the same, and also concerning the Oxfordshire estates in the indenture hereinbefore stated; and Viscount Dillon thereby assigned to the said trustees, their executors, and administrators, all the household goods, furniture, books, pictures, linen, and china in the mansion-house at Loughglyn upon the trusts declared concerning the same, by the same indenture.

The first of the indentures was not executed by any of the persons who had any charge or lien on the estates therein mentioned by way of jointure, mortgage, rent-charge, annuity, or otherwise, except the several creditors by judgment, who signed their names to the second schedule to the indenture.

All the bond, judgment, and simple contract creditors of the Appellant Viscount Dillon not having specific charges on the estates, with the exception of the Respondents, and a few other creditors, accepted of the provisions made by the indentures, and executed the first stated indenture.

The Respondents were simple contract creditors of the Appellant Viscount Dillon.

The estates in the counties of Roscommon, Mayo, and Westmeath, and Oxford, were respectively charged with the mortgages, jointure, rent-charges, and annuities specified in the first schedule to the first stated indenture annexed, the greater part of which had priority over the life estate of the Appellant Viscount Dillon, limited to him by the indenture of the 14th day of July, 1803.

The mortgages, (except the mortgage for 4,500*l.*) were created in pursuance of powers reserved by the

same indenture, and thereby directed to have precedence and priority over the life estate of the Appellant Viscount Dillon, and the excepted mortgage, created by virtue of the Act of Parliament; and all the incumbrances had priority over the indentures of 4th July, 1816, and the annuity of 5,000*l.* by the first mentioned indenture of 4th July, 1816, reserved to the Appellant Viscount Dillon.

The legal estate was outstanding, and became vested in Richard Williams and Benjamin Brooks, for a term of one thousand years, for raising the sum of 64,368*l.*, and interest, under and by virtue of an indenture bearing date the 21st day of July, 1804, and made, or expressed to be made between Charles Viscount Dillon, of the first part; Robert Skelton, since deceased, of the second part; and Richard Williams and Benjamin Brooks of the third part; and which term of years was created in pursuance of a power for that purpose given by the indenture of the 14th day of July, 1803, to Charles Viscount Dillon.

The rents and profits of the lands, as received by the agents of the trustees of the indentures, so far as the same were sufficient and applicable for that purpose, were from time to time applied towards keeping down the payments provided by the indenture.

The mansion-house at Ditchley, together with the furniture and other articles therein, had been from time to time let, and the rent received in respect thereof, and of the furniture, had been applied in like manner towards keeping down the payments prescribed and directed by the indenture.

On the 13th day of July, 1820, the Respondents filed their original bill of complaint in the Court of Chancery in Ireland, against the Appellants, and also against Edward Jerningham and John Hosier,

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both since deceased, thereby stating, that the Appellant Viscount Dillon had become indebted to them for goods sold and delivered early in the year 1815, and that the Respondents had sued the Appellant Viscount Dillon for the said demand in the Court of King's Bench in England, and had recovered judgment against him thereon, in or as of Michaelmas Term, 1818, for the sum of 898*l.* 10*s.* and that on the ground of the said judgment, they had also recovered judgment against the Appellant in the Court of King's Bench in Ireland, as of Trinity Term, 1819, for the debt aforesaid, besides costs, amounting in the whole to the sum of 1,000*l.* of lawful money of Ireland; that having so recovered the last-mentioned judgment against the Appellant Viscount Dillon, the Respondents, on the 23d of November, 1819, caused a writ of execution, (a *fiери facias*) against the goods of the Appellant Viscount Dillon, to issue, and that the same was delivered to the sheriff of the county of Roscommon, to levy the amount thereof; and that the sheriff seized the goods and chattels of the Appellant Viscount Dillon, in his mansion house at Loughglyn, and would have sold the same, and thereout levied the debt, but that the law agents of the Appellant caused a claim of property to be lodged with the sheriff, alleging that the goods were not the property of the Appellant Viscount Dillon, but of the Appellant Charles Butler, and of Edward Jerningham and John Hosier; and that the sheriff thereupon refused to execute the writ of execution by a sale of the goods: And further stating, that it appeared from a search made by the Respondents in the public registry office for deeds in the city of Dublin, that by indenture, bearing date the 4th of July, 1815, the Appellant Viscount Dillon granted and demised to

the Appellant Charles Butler, and Edward Jerningham and John Hosier, their executors and administrators, the freehold castles, baronies, manors, messuages, mills, lands, tenements, tithes, and hereditaments, situate, arising, and being in the counties of Roscommon, Mayo, and Westmeath, and the barony of Costello and Boyle in Ireland, and all other the hereditaments and premises in the said counties and elsewhere in Ireland, of which the said Viscount Dillon, or any persons in trust for him, was or were seised or possessed, to hold the same, subject and charged, as in the said memorial mentioned, unto the said Appellant Charles Butler, and Edward Jerningham and John Hosier, from the day next before the day of the date thereof, for the term of ninety-nine years, if he the said Viscount Dillon should so long live, without impeachment of waste, upon the trusts, by the said memorial stated, to be mentioned in an indenture of the 4th of July, 1815 : And further stating, that it appeared by the said memorial, that the said Appellant Viscount Dillon did, by the same indenture, bargain and sell unto the said Appellant Charles Butler and his said co-trustees, their executors, administrators, and assigns, all the household goods, furniture, and other chattels, of and belonging to the Appellant Viscount Dillon in and about his mansion house at Loughglyn aforesaid, to hold the same to the said trustees, as fully and effectually as the Appellant Viscount Dillon could be entitled to the same, upon the trust in said memorial alleged to be mentioned in the said other indenture, of even date therewith ; that the said indentures were not registered until the year 1817, and that the Respondents were ignorant of the trusts thereof ; that the Appellant Viscount Dillon was strict tenant for life of the said estates, and

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that the said indentures were calculated to defeat proceedings at law against the said estates, by the Respondents and the other creditors of the said Appellant Viscount Dillon, who (as stated in the said bill) was indebted to divers other persons by judgments, bonds, and otherwise, to a very considerable amount : The Bill prayed that the contents of the said deed of trust of the 4th of July, 1815, might be fully set forth by the said trustees, and that the Respondents and the other creditors of the Appellant Viscount Dillon, who should come in and contribute to the expense of the said suit, might be at liberty to elect whether they would agree to accept of the provisions of the said deed, in liquidation and satisfaction of their respective demands or not ; and that in case they should not elect to agree to accept the same, that then the said indenture of the 4th of July, 1815, and the said deed of trust therein mentioned and referred to, might be deemed fraudulent and void, and of no effect against the Respondents and others of such creditors of the Appellant Viscount Dillon as aforesaid ; and that the temporary bars raised thereby might be removed, if necessary, to give effect to the Respondent's said judgment at law ; and that, in the mean time, and until the hearing of the cause, a receiver should be appointed to receive the rents and profits of the said towns, lands, and premises, and that the same should be brought in and lodged in the Bank of Ireland to the credit of the said cause, and applied in the payment of the said judgment debts and incumbrances of the said Appellant Viscount Dillon, according to their respective priorities ; and that the Respondents and the other creditors as aforesaid, might be paid thereout their several and respective demands, according to their respective priorities, and that all neces-

sary accounts might be directed to be taken at the hearing of the cause.

Before any further proceedings were had in the cause, Edward Jerningham and John Hosier died; and the Appellant Charles Butler, the surviving trustee, afterwards put in his answer to the bill: the Appellant Viscount Dillon likewise put in his answer thereto.

In pursuance of the power for that purpose contained in the indenture of the 4th of February, 1815, the Honorable Douglas Kinnaird and Dominick Browne, were appointed trustees of the estates, in the place of Edward Jerningham and John Hosier.

On the 20th day of April, 1824, the Respondents filed a supplemental bill (called in the pleadings an amended bill) against the Appellants, stating, amongst other things, that since the filing of their original bill, they had seen the indentures of the 4th of July, 1815, and setting forth the trusts thereof; and further stating, that the Respondents, being unable, by reason of the deed of trust, to obtain any fruits from the writ of *feri facias*, issued at the suit of the Respondents against the goods of the Appellant Viscount Dillon, and that having discovered that he was entitled by the trust deed of the 4th of July, 1815, to an annual sum of 5,000*l.* out of the rents and profits of the estates vested in trust in the Appellant Charles Butler, as surviving trustee, they had caused a writ of *elegit*, grounded on the judgment obtained in the Court of King's Bench in Ireland against the Appellant Viscount Dillon, to issue, marked for the sum of 1,027*l.* 11*s.* 4*d.* and directed to the sheriff of the county of Roscommon, who returned, that the Appellant Viscount Dillon, or the Appellant Charles Butler, in trust for him, was seised as of freehold of a clear

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yearly rent of 5,000*l.* issuing out of the lands and hereditaments in the county of Roscommon in the return and bill particularly mentioned and set forth; and that the sheriff had returned upon the writ, that he, on the day of taking the inquisition, by virtue of the writ had delivered one moiety of the rent of 5,000*l.* to the Respondents, to hold to the Respondents and their assigns as their freehold, according to the form of the statute in that case made and provided, until they should have fully levied the damages in the writ of *elegit* specified: and also stating, that they were entitled to have the moiety of the lands and premises comprised in the return, or of the rent of 5,000*l.* per annum, or that if they should not be deemed entitled to a moiety of the rent of 5,000*l.* by virtue of the *elegit*, that they were entitled to have satisfaction of the judgment out of the rent of 5,000*l.* or of such part thereof as in the order and course of priority, directed by the deed of trust of the 4th of July, 1815, should be payable to Viscount Dillon in pursuance of the trust: And thereby praying, that a receiver might be appointed to receive the rents, issues, and profits of one moiety of the lands and premises comprised in the sheriff's return on the writ of *elegit*, to the extent of one moiety of the yearly sum of 5,000*l.*; and that the Respondents might be paid the same, or a competent part thereof, in discharge of their demand, or that a receiver or receivers might be appointed to receive the rents, issues, and profits of the several lands and premises comprised in the deeds of the 4th day of July, 1815; and that the rents of the Oxfordshire estates, and of a competent part of the trust estates, if necessary, might be applied in payment of the annual sums, charges, and expenses by the trusts of the deed directed to be paid

in priority to the 5,000*l.* a year, thereby made payable to the Appellant Viscount Dillon; and that after such satisfaction and discharge of the annual payments having such priority, one moiety of the sum of 5,000*l.* a year, or a competent part thereof, might be applied towards payment of the Respondent's demand; and that the Appellant Charles Butler might be restrained from paying over the yearly sum of 5,000*l.* or any part thereof, to the Appellant Viscount Dillon, or to any person for his use, until the demand should be thereout paid and satisfied.

By an order bearing date the 7th day of December, 1824, the Master of the Rolls referred it to the Master to approve of a proper person to be appointed receiver, upon process obtained against the Appellants, to receive such competent part of a moiety of the rent-charge of 5,000*l.* per year, as would be sufficient for the purpose of the Respondents' rights in the cause; and that the Master should report what part would be a competent part of the moiety of the rent-charge of 5,000*l.* for that purpose.

In pursuance of the order, the Master approved of Charles Denroche to be receiver, and reported 1,250*l.* a year as a competent part of the moiety of the annuity for the Respondents' rights, which report was confirmed by an order of the court, bearing date the 16th of December, 1824.

By an order dated the 1st of Feb. 1825, the Master of the Rolls ordered that the Appellant C. Butler should be restrained until his answer to the last-mentioned bill and further order, from paying over to the Appellant, or for his use, the sum of 1,250*l.* per annum, and from making any payments out of the annuity, to the Appellant Viscount Dillon, or for his use, out of any funds which might come to his hands applicable

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thereto, without first retaining sufficient to pay the sum of 1,250*l.* per annum.

The Appellant Charles Butler, on the 7th day of June, 1826, answered the supplemental bill; and after stating and submitting to the court, to the effect hereinafter mentioned to be stated in the answer of the Appellant Viscount Dillon, he stated by his answer, that he claimed no interest in the matters in question in the suit, save as trustee, and that he was ready and willing to act as the court should direct; but he thereby submitted, that Douglas Kinnaird and Dominick Browne, who had, since the death of Edward Jerningham and John Hosier, been appointed trustees of the indenture with him, and the several persons named in the schedules to his answer annexed, marked Nos. 1 and 2, and which he prayed might be taken as part of his answer, having charges upon the estates by mortgage, jointure, and rent-charge and annuity, and also the several other persons in the same schedules named and described, and who, being creditors of the Appellant Viscount Dillon by bond, judgment, and simple contract, had executed the indenture hereinbefore first mentioned, were necessary parties to the suit.

By an order of the 27th day of July, 1826, it was ordered by the Master of the Rolls, that the Appellant Charles Butler should be restrained, as ordered by the order of the 1st of February, 1826, from paying the sum of 1,250*l.* a year to the Appellant Viscount Dillon, until he should answer the supplemental bill, and until further order.

The Appellant Viscount Dillon put in his answer to the supplemental bill on the 14th day of December 1826, whereby, after noticing that the relief prayed by the original bill, was essentially different from the

relief prayed by the supplemental bill, he stated, that the indentures of the 4th of July, 1816, were made for the benefit of and for the purpose of paying his creditors, at the date of the indentures, as well by specialty as simple contract, their several debts; and that as the judgment in the Respondents' bills stated was obtained after the execution and registry of the deeds of trust, the deeds were good and valid against the Respondents; and that he had not since the date and execution of the indenture, been in the receipt of the rents and profits of the estates in the indenture mentioned, or in possession of the personal effects therein also mentioned, or any part thereof; and that his trustees and the trustees thereafter named, had not been in such receipt since the date and execution of the indentures, except so far as the receipt of the rents and profits of the lands by Henry North and Matthew Wyatt, might be considered as the receipt of such rents and profits by the trustees, and except so far as letting the mansion-house of Ditchley, with the household furniture and effects in the same, and permitting Matthew Wyatt and Jarrard Edward Strickland respectively, who had been appointed agent in Ireland, in the place of Matthew Wyatt, to reside in the mansion-house at Loughglyn, and to use the furniture and effects therein, might be considered possession thereof by the trustees; and that Matthew Wyatt, Henry North, and Jarrard Edward Strickland, were appointed agents by the indentures of the 4th July, 1816, or in pursuance of a power for that purpose therein contained; and that so far as the rents and profits of the estates received by such agents as aforesaid, were sufficient and applicable for that purpose, they had been applied towards keeping down such and so many of the annual payments, as were

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provided by the indentures to be paid to the persons who were made parties to the indentures in the supplemental bill first mentioned of the second part; and that the present annual income derived from the estates in England and Ireland, might be calculated to amount to the sum of 18,850*l.* British; but that some time back, in consequence of the great agricultural distress, the same did not exceed the gross annual sum of 15,000*l.* out of which charges and expenses to a large amount were to be deducted; and that in consequence of such defalcation of the rents, the trustees recommended to the Appellant Viscount Dillon, to reduce the annuity of 5,000*l.* reserved to him, to an annual sum of 3,000*l.* the better to enable the trustees to pay the annual charges on the estates, and that he readily assented thereto; but that the receipt of the rents, after all necessary payments being deducted therefrom, did not allow the trustees to pay him the reduced annuity of 3,000*l.* and that there were then arrears due to him in respect of the same; that the total amount of the annual payments, charges, and incumbrances charged on the estates, and having priority to the yearly sum of 5,000*l.* amounted to 12,000*l.* a year and upwards; and he submitted to the judgment of the court, whether the Respondents were unable, by reason of the said deeds of trust, to obtain any fruits from the writ of *fieri facias* in the original bill mentioned to have been issued at the suit of the Respondents against his goods and chattels; and that he was unable, as to his belief or otherwise, save as appeared by the supplemental bill, to state whether the Respondents caused a writ of *elegit*, grounded on the judgment obtained in His Majesty's Court of King's Bench in Ireland, to issue, marked for the sum of 1,000*l.* and

27l. 11s. 4d. directed to the sheriff of the county of Roscommon or otherwise; or whether the sheriff returned upon the writ so to him directed, that the Appellant Viscount Dillon, or the Appellant Charles Butler, in trust for him, was seised as of freehold, in one clear yearly rent of 5,000*l.* sterling, issuing and payable out of the lands and other hereditaments in the supplemental bill mentioned; but that if the return of the sheriff was to the effect in the supplemental bill mentioned, he submitted that the return of the sheriff in the supplemental bill stated, was erroneous in setting forth that he, or some person in trust for him, was seised as of freehold in the yearly sum of 5,000*l.* inasmuch as the same was raiseable by virtue of the trusts of equitable terms of years subsisting in the estates respectively, comprised and demised by the indentures of the 4th of July, 1815, being the English and Irish estates of the Appellant Viscount Dillon, and also out of the gains and profits made by means of the furniture at Ditchley house, which is let with the same: that the return could not be acted upon in consequence of its great uncertainty, and that the rent of 5,000*l.* was not issuing out of the lands mentioned in the return alone, but also out of the other estates of the Appellant Viscount Dillon, in England and Ireland, and by means of the personal estate and effects; and that the return was further erroneous in returning that the sheriff of the county of Roscommon had delivered to the Respondents one moiety of the rent of 5,000*l.*, such rent being payable out of all the Irish estates of the Appellant Viscount Dillon, which estates are situate in the counties of Mayo, Westmeath, and Roscommon, and out of the English estates, in the county of Oxford, and out of the personal estate and effects; and that the return,

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if any such existed, had never been filed in the proper office, and is not on the records of the court whereout the *elegit* issued, or of any other court; and that the estates in Ireland, subject to the rent of 5,000*l.* as stated in the supplemental bill, were held by trustees under prior conveyances, whose interests therein were paramount to his, and that therefore they could not be properly taken under the *elegit* therein stated; and he thereby admitted that he continued seised of and entitled for his life, to the estates in the counties of Roscommon, Mayo, Westmeath, and Oxford, subject to the mortgage, jointure, rent-charges, and annuities, and the terms of ninety-nine years respectively created by the indentures; and that he was entitled to the absolute freehold thereof, subject to the several mortgages and incumbrances, and upon the trusts of the terms being satisfied; and he, by his answer, further stated, that part of the lands and hereditaments mentioned in the sheriff's alleged return, had long before been sold by virtue of a power for that purpose contained in the indenture of release and settlement, of the 14th day of July 1803, under which he is tenant for life of the Irish estates, and which power over-rides his life estate, and which life estate was displaced by the exercise of the power; and under the circumstances thereinbefore mentioned, he submitted, whether the Respondents were entitled to be let into possession of one moiety of the lands and premises mentioned in the sheriff's alleged return.

After the answers were put in to the supplemental bill, on the 6th of December, 1825, applications were made to the Master of the Rolls, on the behalf of the Appellants, that the receiver appointed in the cause might be removed, and that Charles Butler, together

with his co-trustees, might be at liberty to pay over to the Appellant the sum of 1,250*l.* per annum, part of his annuity, in the order of the 27th of July then last mentioned, and all arrears thereof then due, and that the Appellant Viscount Dillon might be at liberty to call for and receive the same.

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At the same time an application was made by the Respondents, to continue the receiver, and that the Appellant Charles Butler might be restrained from paying over the 1,250*l.* per annum to the Appellant Viscount Dillon but should be compelled, in case the court continued the receiver, to pay over the same to the receiver, or that the receiver should be at liberty to receive it from the tenants of the lands; and that the payment thereof should be computed from the gale day on which the annuity was payable to the Appellant Viscount Dillon, preceding the Master's report, which allocated the sum of 1,250*l.* to the Respondents, in payment and satisfaction of their demand.

By order bearing date the 14th day of December, 1825, the Master of the Rolls, making no rule on the application of the Appellants, ordered, on the application of the Respondents, that the restraining order of the 27th of July, 1825, should be continued until hearing and further order; and that the Appellant Charles Butler might be restrained as ordered by the last-mentioned order from paying over in any manner to the Appellant Viscount Dillon, the sum of 1,250*l.* per annum therein mentioned, or from making any payments out of the annuity in the order and report mentioned to the Appellant Viscount Dillon, or for his use, out of the funds that might come to his hands, applicable thereto, without first retaining sufficient to pay the 1,250*l.* per annum, until the hearing and further order; and that the Appellant Viscount

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Dillon, be restrained, until hearing and further order, from receiving the 1,250*l.* per annum from the Appellant Charles Butler, and from receiving any payments out of the annuity, without first leaving sufficient to pay the said 1,250*l.* per annum.

The Appellants appealed to the Lord Chancellor of Ireland from the order of the Master of the Rolls of the 14th of December, 1825; and also from the order of the 27th of July, 1825, the order of the 7th of December, 1824, the Master's report thereunder, the order of the 16th of December, 1824, confirming the same, and the several proceedings thereon, so far as the same in any way related to the order of the 14th of December, 1825; and the Appellants by their counsel moved that the receiver might be removed, and that the Appellant Charles Butler, in conjunction with his co-trustees, might be at liberty, in execution of the trusts in the trust deed in the pleadings mentioned, to pay over to the Appellant Viscount Dillon, and that the Appellant Viscount Dillon might be at liberty to call for and receive the sum of 1,250*l.* per annum, part of the annuity, and all the arrears thereof; which motion, by way of appeal, came on to be heard before the Lord Chancellor of Ireland, on the 4th of February, 1827, whereupon his Lordship affirmed the order of the Master of the Rolls, with costs.

The appeal to the House of Lords was from the orders of the 7th of December, 1824, of the 16th of December, 1824, of the 27th of July, 1825, and the 14th of December, 1825, and of the 4th of February, 1827.

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For the Appellants—*Mr. Sugden* and *Mr. Lynch*.

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The question in the appeal depends upon the trust to pay out of the rents and profits an annuity of 5,000*l.* a year to Lord Dillon. The appeal is against the order of

the Master of the Rolls, restraining the trustee from paying the annuity, and the order of the Lord Chancellor confirming it. The previous orders being only until answer or further order, could not be the subject of appeal. The covenant on the part of the creditors, not to sue Lord Dillon, or take the property in execution, is a sufficient consideration for the conveyance. The deed itself is not impeachable in equity for fraud.

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The supplemental bill praying relief, different from that which is prayed in the original bill, is irregular, and being so, no order could be made upon it; the original bill should have been dismissed, and a new one filed.\* There is also a defect of parties, the original trustees being dead and new trustees appointed; the appointment was in 1823, and the supplemental bill was filed in 1824. The Respondent, by the original bill, prays to have the deed rescinded; by the supplemental bill, he prays relief under the deed: these are opposite and inconsistent prayers.

The sheriff, as appears by his return, seized a moiety of the rent, which, as it is stated, he has delivered to the party. This is not a case, therefore, where the aid of equity is asked to obtain execution; there is no such case where equity has ever interfered; the interference of equity is only to remove impediments to the execution. The next question is whether the party is intitled to have the legal bars removed. Equity can only supply defects of the law. The case made in this suit is that the property was seized and delivered to the party. The first objection to the seizure is that the sheriff has no authority by law to seize a rent-seck; he must execute the writ by seizing the land, *Walsall v. Heath*; † in which case,

\* See *Davidson v. Foley*, 2 B. C. C. 203.

† Cro. Eliz. 656.

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the return being of a seizure of a rent, was held bad upon demurrer, because a rent-seck cannot be delivered as *liberum tenementum*.

Another difficulty is, that according to the finding and the facts, Lord Dillon had a life estate subject to prior charges; the sheriff should have seized a moiety of that life estate. The return is void on the face of it, and being void at law, it is unavailable in equity; no relief can be given upon it. If Lord Dillon had a legal estate for life, there could have been no proceeding upon such a return, and equity can only remove a legal bar where the proceeding is regular at law.

Supposing the rent to be subject to execution, the inquisition is void upon another ground, for the rent issues out of lands in England and Ireland, and also from goods, not from one subject or each severally, but from all jointly; the sheriff of Roscommon could not seize a moiety of that intire rent.

The order is defective also for want of parties; two of the trustees are not before the court; the relief is against all the estates; a receiver cannot be appointed unless all parties are before the court. The rule of equity, as to parties, is to prevent circuity of action and multiplicity of suits; a plaintiff is bound, therefore, to proceed against all estates and interests at once, not piecemeal; such an order cannot be made in the absence of trustees. If the defect of parties could be excused in a common case, not so in this, because the relief sought by the supplemental bill differs from that which was prayed by the original bill.

It may be said that by statute\* it is enacted that a seizure in execution against the trustee shall be good against the *cestui que* trust, but the sheriff had no

\* 29 Car. 2, 3.

right to seize at all; the property was not subject to execution. In *Lyster v. Dollond*,\* it was held that an equity of redemption is not subject to execution. So in *Scott v. Scholey*,† *Metcalfe v. Scholey*.‡

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It is not a sufficient execution within the statute of frauds, and the statute does not apply to cases of complicated trust, but only to naked and simple trusts; it was an improvident attempt of the legislature to make trusts subject to execution; it is so confined in practice, that no instance has occurred in which execution ever issued against a trust estate of a term; the result is, that it is found in practice not to be a fit subject for execution; the creditor must proceed at law and come to equity to remove a legal bar; there should have been a *fieri facias* and a return, *Balsh v. Wastall*, § *Shirley v. Watts*.|| All the authorities prove that to entitle himself to relief in equity, a party must proceed as far as he can at law. In *Davidson v. Foley*, Lord Thurlow said that "all he could gather from the cases was, "that where the court could see there was a good "judgment, it would not stop without aiding that title "by what is called an equitable *elegit*, but he could "not carry it higher than that; that the *equitas sequens legem* must be such as to assure the court "that the case was such as could be followed by a legal "execution; but that where it appeared that the "judgment could not be followed by a legal *elegit*, "the court could not follow it by an equitable *elegit*." In this case it is apparent on the face of the return, that the creditor could not have proceeded at law; Lord Dillon had the land, and the execution should have been against the land; there should have been a

\* 3 B. C. C. 602. 1 Ves. J. 431.

† 8 East, 467.

§ 1 P. W. 445.

‡ 2 B. and P. N. R. 461.

|| 3 Atk. 200.

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return of *nulla bona* ; whereas, on the face of the proceedings there is a legal seisin. The sheriff states that he has delivered the property in satisfaction. Where then is the necessity for relief in equity ? According to the return, it must be supposed that the creditor is in possession.

*The Lord Chancellor.*—Suppose this had been a case merely at law, would not this have been the form of the return ? It is not satisfaction. The sheriff does not deliver possession ; but the party proceeds by ejectment ; the usual return of the sheriff is, that he has delivered, although in fact he does not deliver.

*Mr. Sugden.*—Where there is no adverse possession, he does actually deliver : the objection is, that there is no necessity for the interposition of equity.

Another objection fatal to the orders in the court below is, that they were made in the absence of parties who are interested in the administration of the funds. Where property is subject to incumbrances, relief in equity has always been granted in the shape of a power to redeem prior incumbrances. The annuity, in this case, can only be reached by considering it as part of the old reversion.

It is no answer to an execution against A. that the legal estate is in B. for A. The only case where he is stopped at law is, where there are trusts to be executed prior to his charge, and then he is entitled to redeem and remove the temporary bars. A court of equity never allows subsequent incumbrances to come in against prior ones, without offering to redeem. The only relief is an application to redeem the prior incumbrances. If a court of equity will enable a judgment creditor to proceed against a debtor's interest, he must bring before the court all the parties who have any interest to contest in the subject. The point

stands thus:—According to the trusts of the deeds, the fifth and sixth trusts are to pay Lord Dillon's 5,000*l.* per annum, and interest to the creditors. This 5,000*l.* per annum is not to precede the interest to the creditors.

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*The Lord Chancellor.*—They are all classed together, on the assumption that there was enough for all.

*Mr. Sugden.*—There is no priority between the creditors' and Lord Dillon's allowance. The fund must be distributed *pari passu* between them. The objection to the orders is, that they have ordered 1,250*l.* per annum to be taken in the absence of the creditors, who have an equal right with him, and in the absence of Lady Dillon and a mortgagee. This objection is of a more limited nature than the general one before advanced. Suppose 1,250*l.* be ordered to be paid, and, from defalcation of rents, the jointress, mortgagee, and other prior creditors were not paid; would they not have a right to say that the court had taken away a fund which ought to have been applied to prior incumbrances? The consequence would be that all the prior creditors might file bills to have their rights declared. What is the common subject? The estate out of which the rent is to be paid. Lord Dillon is not entitled to the 5,000*l.* per annum, unless the prior charges are paid, and the interest to the creditors. A receiver ought not to be appointed to take 1,250*l.* per annum out of a common fund to which prior incumbrancers are entitled. The 1,250*l.* may be applicable to the payment of the former incumbrances. A court of equity had no right to touch it, unless they had all the parties to the trust deed before the court. The 5,000*l.* per annum is not a distinct subject. You cannot argue the question of priority unless you have all the parties before the court. A

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court of equity does not grant a receiver on motion, unless they see on the face of the proceedings that they would give relief at the hearing. It is not stated in the bill that the return was filed, though they state it in the case; but the return was never filed. The only evidence was an affidavit of debt. The want of evidence is a sufficient objection to the order. In all the cases\* the sheriff made his return of *nulla bona*, &c.; but in this case he has made no such return, but has declared that he has delivered the property to the plaintiffs. How then are they obstructed? and until they are obstructed they have no right to relief in equity. The right was an entry on the land. Have they been obstructed in entering upon the rent? No. The return is fraudulent, illegal, and void. The sheriff had no right to deliver the rent-seck; he ought, if any thing, to have delivered the lands by metes and bounds.† The return is fraudulent for this reason:—It is stated that the trustees were seised for Lord Dillon of the rent-charge out of the lands in the county of Roscommon. The jurors must have had the deed before them; and having it, they must have known that it was issuing out of lands in other counties; yet it is alleged to be issuing out of lands in the county of Roscommon alone. So the sheriff says there are no goods; yet on the face of the deed it appears there were goods in Roscommon. This is a rent-seck, and held in trust for Lord Dillon; it cannot, therefore, be taken in execution. If the cause were brought to a hearing, the Respondents would not be entitled to relief, because of the absence of parties and the irregularity of the return. The interlocutory orders ought

\* *Balch v. Wastall.* † *Fenny v. Durant*, 1 B. and A. 40.

not therefore to have been made. A court of equity does not grant ancillary relief unless the right be clear. That Lord Dillon is abroad, and tenant for life, are new equities. It is not true that these parties are without remedy. The Respondents have the same remedy after as they had before the execution of the deed.

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For the Respondents—*Mr. Horne* and *Mr. B. Parry*.

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The question is not whether the annuity of 5,000*l.* a year is extendible, but whether under the circumstances a part should be impounded to abide the decision of the cause; although the 5,000*l.* a year is not extendible at law, it does not follow that it cannot be reached in equity; an equity of redemption of a leasehold for years is not extendible at law, but may be made available in equity.\* The court interferes, not to enforce the judgment of a court of ordinary jurisdiction, but because the party has no remedy at law, the property sought being of an equitable nature. In *Burdon v. Kennedy*, Lord Hardwicke said that the execution had no effect at law, and consequently that by the common equity of the court the creditor had a right to relief. In the present case there is no remedy at law. The property in question is the creature of and only exists in equity. The case of Bank stock and of debts is different; in those the debtor has the legal right, and they must be reached, if at all, in a court of law. As to Bank stock, it is the creature of the legislature, which forgot to provide a remedy for the creditor. But the property in this

\* *Shirley v. Watts*, 3 Atk. 200. *Burdon v. Kennedy*, ib. 739. *Lyster v. Dolland*, 1 Ves. jun. 435.

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case is the creation of the debtor, the creature of equity, over which the court has control, and will apply a remedy according to its doctrines. The cases where a judgment creditor is allowed to stand in the situation of a puisne mortgagee have no analogy to the present. In those cases the court gives relief, on the principle that the creditor who had his demand is entitled to stand in the place of the debtor, and therefore the creditor is allowed to redeem as the debtor might do. In those cases, the debtor having pledged his estate for a particular debt, he has the right to redeem; but in this case the debtor's estate is not pledged, but actually conveyed on trust. The principle of giving to a judgment creditor relief against an equity of redemption, applies in this case; it is to enable the creditor by the medium of equity to obtain the debtor's right in equity. Whether it is an equity of redemption upon a lease for years, or a trust for the debtor upon an annuity of 5,000*l.*, it ought to be equally available for the creditor. The case of the Respondent does not rest upon the *elegit*: the annuity is a chattel interest; and to proceed in equity it is only required that the creditor should have taken out execution, which has been done; it is not necessary that the return should have been procured.\*

The title of the Respondent is good under the *fiery facias*:† as to the objection that the *elegit* is directed only to the Sheriff of Roscommon, it is trifling: the annuity issues *per mie et per tout*: if the lands lie in twenty counties it cannot be necessary that there should be an *elegit* in each. The debt and the execution being admitted, and that the Respondent is not privy to the deed of trust, the title of the Respondent

\* Red. Pl. pa. 102.

† *Vandercom v. Miller*, 21 Jan. 1818, in Cha.

is sufficiently clear for a receiver. Lord Eldon, in a similar case, has granted an order for a receiver. The plaintiffs were creditors who had obtained judgment, and delivered an *elegit* to the sheriff, but could not make the writ available, without the aid of equity; the debtor being seized in fee subject to an annuity charged upon the estate, the lands being demised for a term to secure the payment. The counsel for the defendant relied on the objections that an equity of redemption of a term is not extendible, and that there was no inquisition. Lord Eldon held in such a case that there was a resulting trust for the defendant, and granted the order. But the Respondents rely upon the order for an injunction, and waive the right to a receiver, which was superseded by the order for the injunction. The orders appealed from do not declare the right. They only impound the fund to await the event of the cause. Lord Dillon being resident abroad, having no estate liable, and having neglected to put in his answer, the order for the injunction is well founded. The creditors and incumbrancers are not necessary parties. Their rights are not disturbed. The relief sought is only against the 5,000*l.* a year, which is in equity the property of Lord Dillon. Whether he or the Respondents receive that sum, or any part of it, is immaterial to the creditors. The injunction only restrains the trustee from paying to Lord Dillon, and him from receiving the annuity, until enough is reserved for the Respondents. The new trustees having come in, *pendente lite*, are not necessary parties.\* In fact, the new trustees are now brought before the court below, and the Appellants might have called them as parties. But Mr. Butler is a sufficient representative of his co-trustees.

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\* *Metcalf v. Pulbertoft*, 2 V. and B. 206.

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The case is reduced to this question of equity: Can a man, by his own contract with some creditors, give himself an interest which shall *not be subject* to his other creditors? He could not do it *at law*, why can he in equity? If Lord Dillon could reserve to himself 5,000*l.* a year, he might reserve 19,000*l.* Will equity enable a man to defraud his creditors? Will equity carry trusts into execution contrary to justice? Will equity, by means of trusts, its own peculiar creatures, take property out of the reach of creditors and give it to a debtor? This 5,000*l.* a year existing only in *equity*, is to be dealt with according to equity. This deed conveys **EVERY** thing to trustees. The Respondents have no possible means of payment except by application of the 5,000*l.* a year. Lord Dillon resides abroad, has only a life-interest, and unless the money is impounded as ordered, the Respondents may lose all any moment.

21 July, 1828.

*The Lord Chancellor.*—This is a case of appeal from certain orders made by the Master of the Rolls in Ireland, the Lords Commissioners of the Great Seal in Ireland, and the Lord Chancellor of Ireland. It appears that the Master of the Rolls in Ireland, the Lords Commissioners of the Great Seal in Ireland, and the Lord Chancellor of Ireland, have all concurred in their judgment in respect to the points to which I am to call your attention, but the parties were not satisfied without appealing to this House.

This case arises out of a debt due to the Respondents, Plaskett and Brett, who are wine-merchants in this city. They had supplied Lord Viscount Dillon with wine to the amount of seven or eight hundred pounds. He did not pay the bill: in consequence of which they brought an action against him in 1817, in

the Court of King's Bench in this country, and recovered judgment. They were not, however, able to obtain any fruit of that judgment, in consequence of which it became necessary for them to proceed in Ireland. They brought an action there in 1819, and recovered judgment in that action to the amount of 1,000*l.*, and 27*l.* costs of their debt. A *fiery facias* was sued out upon that judgment, to take possession of the effects, for the purpose of obtaining the fruits of the judgment: but the moment the sheriff had taken possession, he received notice on behalf of Mr. Charles Butler, and other individuals whose names are mentioned in this paper, who describe themselves as trustees under a deed executed in the year 1815, by which they claimed the whole of this property. The consequence was, that the Sheriff was obliged to relinquish possession. Under these circumstances it became necessary for the Respondents to take other proceedings for the purpose of recovering their debt, and accordingly they filed a bill in the Court of Chancery in Ireland against Viscount Dillon, and against his trustees: answers were put in to that bill; and the result was, that it was discovered by the Respondents that a deed had been executed in the year 1815, of which they had not before been apprised; but when they became acquainted with all the particulars of that deed, it turned out that by that deed Lord Viscount Dillon, possessing estates in the counties of Roscommon, Mayo, and Westmeath, in Ireland, and in Oxfordshire in this country, which had been previously charged with certain incumbrances, and which were subject to those incumbrances, conveyed them to trustees for the purpose of securing to Lord Dillon 5,000*l.* a year for his life; and with respect to the surplus rents for the purpose of discharging the debts

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due to certain persons who had executed that deed. It is quite obvious, therefore, that as there was 5,000*l.* a year not subject to the prior incumbrances, but reserved to Lord Dillon, Messrs. Plaskett and Brett had a right to look to that sum for the purpose of discharging the debt which he owed to them, to do which it was necessary to proceed in a court of equity. The Respondents sued out an *elegit*, directed to the sheriff of the county of Roscommon; after that *elegit* had been sued out, and returned, they filed a supplemental bill; and to that supplemental bill answers were put in by Lord Dillon, and by Mr. Charles Butler, the trustee.

Before the answer to the supplemental bill was put in by Mr. Charles Butler, an application was made on the part of the Respondents to the Master of the Rolls in Ireland, to appoint a receiver; but before a receiver was appointed, one of the Masters of the Court was directed to ascertain what proportion of the 5,000*l.* a year it would be necessary to set apart to pay the debt of the Respondents. The Master having reported that 1,250*l.* of this sum would be necessary, a receiver was appointed, for the purpose of taking possession of the 5,000*l.* a year to the extent of 1,250*l.*; and afterwards another order was made, by which Mr. Butler was restrained from paying over the whole of the 5,000*l.* a year, the sum of 1,250*l.* being made applicable to the purpose of discharging this debt. After the answer was put in by Mr. Butler, an application was made to discharge these orders; but the Master of the Rolls refused to discharge them; I think an application was also made to the Lords Commissioners, and they also refused. After the answer of Lord Dillon came in, a second application was made to discharge these orders; but the Master of the Rolls

refused to discharge them, and directed that the order by which Mr. Butler was restrained from paying over the 1,250*l.* should be continued till the hearing of the cause, and until further order.

It is against this last order, and the other orders which are the foundations of it, that the present Appellants have appealed. With respect to the merits, there can be no question ; every possible delay has been interposed for the purpose of preventing the Respondents reaping the fruit of their judgment ; but various objections have been made in point of form, which have been argued with great ability at the Bar, and to which I am to call your attention.

In the first place, it was said that there were not the proper parties to the suit ; that the prior incumbrancers ought to have been made parties to the suit : but the prior incumbrancers had nothing to do with this order, for this order operates only on the 5,000*l.* a year that came into the possession of Mr. Butler ; and the only question is, whether Mr. Butler has a right to take possession of it ; therefore it is quite clear, that the prior incumbrancers need not have been called before the court. But then it is said, that the creditors who were parties to the deed of 1815 ought to be parties to this order. The same answer applies to them ; they have no interest in this question, for they have no right to any of the rents and profits till the 5,000*l.* has been paid.

It is then said, there are two particular individuals who are now trustees, and ought to have been made parties to this suit. After the original bill was filed, and a short time before the supplemental bill was filed, two of the original trustees having died, two new trustees were appointed, but no communication was made, previously to the filing of the supple-

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mental bill, of those additional trustees having been appointed, nor was it known till a late period of the cause that they had, in point of fact, been appointed; they stood in precisely the same situation and the same interest with Mr. Butler, and it does not appear that when this case came before the Lord Chancellor any objection was made that these trustees were not parties. If any objection had been made, it would have been obviated in an instant; they were merely formal parties, and their names might have been added. It appears to me, therefore, that even if there were originally an objection in point of strict law, it ought not to prevail at this period of the cause, with respect to an order of this description, a mere interlocutory order, the object of which is to secure a fund for these claimants, in the event of their claim being ultimately allowed.

Having disposed of these objections in point of form, the next difficulty raised was with respect to the *elegit*. It was said that the return of the *elegit* was defective in point of form, and various ingenious arguments were raised upon that point. The short answer to all those arguments is, that it was not necessary that any return whatever should be made; that the mere suing out the *elegit* was all that was necessary; therefore, as it appears to me, no injurious consequence follows in this cause from the circumstance of any defect in the return which the sheriff made to the *elegit*. Then it was contended, that it appears upon this return that satisfaction had been made to the present Respondents, that the property had been seized into the hands of the sheriff, for the purpose of discharging this debt. The answer to that is, that it is quite clear from the whole nature of these proceedings, and the pleadings in this case, that there

had been no satisfaction; and it is quite clear from the answer of Lord Dillon himself that that is the case. I apprehend, therefore, that no objection can be raised from the supposition that any satisfaction has been received, that supposition being built on the inaccurate return of the sheriff.

The only remaining objection which I now bear in my mind is that there ought to have been an *elegit* in each county. The Irish property is situate in the counties of Roscommon, Mayo, and Westmeath; only one *elegit* is sued out, and that in the county of Roscommon. I think it is perfectly clear that one *elegit* was sufficient.

Having disposed of these questions of law, I should humbly recommend to you that the judgment of the court be affirmed; and as it appears to me that the proceedings have been conducted entirely for the purpose of delay, I conceive under such circumstances, there being no serious doubt in my mind, the judgment ought to be affirmed, with 150*l.* costs.

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Judgment affirmed, with 150*l.* costs.

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## IRELAND.

(COURT OF CHANCERY.)

FRANCIS ARTHUR KNOX GORE - - - *Appellant.*

|                                |   |                     |
|--------------------------------|---|---------------------|
| ROBERT EDWARD Viscount LORTON, | } | <i>Respondents.</i> |
| DANIEL CUDDY, HENRY CAREY, and |   |                     |
| HARRIET KELLY - - - - -        |   |                     |

And

R. E. Viscount LORTON - - - - *Appellant.*F. A. KNOX GORE - - - - - *Respondent.*

A., by marriage articles, bound himself "to pay to H. upon his marriage with E., (the said H. settling all the estates and money he was then entitled to on the issue of the marriage, and a suitable jointure to the fortune E. gave him,) the sum of 5,000*l*." H. in the same articles bound himself "to settle all the estate and money which he was then entitled to upon the issue of E., and a jointure of 500*l*. a-year."

Four years after the date of these articles and the marriage, H. acquired an estate which was limited to the issue of the marriage, with a power reserved to H., under which, after a lapse of twenty-six years, he by deed appointed to his wife E. 500*l*. per annum by way of jointure, and 6,000*l*. to the younger children of the marriage as portions.

Held in the Court below, and on appeal, that this was a performance of the condition upon which A. contracted to give to H. a marriage portion of 5,000*l*.; and that so much of that sum as was not paid on the marriage became due on that event, and was a charge on the estate of A., payable with interest from the date of the marriage.

The original articles were not produced in the cause, but it was in proof that H. was the executor of A.; that the house of H. in Ireland had been occupied by a French and rebel army, and his papers ransacked and scattered; that L. was the executor of H., and that the houses of H. and L. had been searched, but

that the original articles could not be found. Under these circumstances secondary evidence—viz. a copy of the articles sent with a case laid before counsel; a charge in the solicitor's bill for the copy and case; a recital of the Articles in an Act of Parliament for settling lands on the issue of the marriage, and a deed appointing a jointure according to the articles and portions to children, under a power reserved by the Act, were admitted as proof of the existence and contents of the articles.

This decision was affirmed on appeal.

A. by his will limited his lands to E. his daughter, and H. her husband, for their lives, &c.; remainder to their sons successively in tail; remainder to M. his daughter, and F. her husband, for their lives, &c.; remainder to their sons successively in tail; with divers remainders over, including C. and his sons, and their issue; and he declared and provided by the will, that in case M. or F., or the sons or son of F. and M., or either of them, should become entitled to the estate under the limitations of the will, a sum of 2,000*l.* should be charged on the lands in possession, for the use of the younger children of C., in certain specific proportions. E. and H. died without issue. The sons of M. and F. died before the estate became vested in them; and after the death of M. and F., and the expiration of the preceding life-estates, G., a grandson of M. and F., became entitled under the limitations of the will to an estate-tail.

Held in the court below, and on appeal, that the lands having vested in a grandson, and not in a son of M. and F., were nevertheless liable to the charge created by the will in favour of the younger children of C.

In the years 1758 and 1764 H. had paid the sums of 400*l.* and 2,000*l.* of the debts of A., and had from time to time, and at the periods of these payments, received various monies belonging to A. from his agents. A bill being filed by the representatives of A. to ascertain and raise certain charges upon A.'s estate; H. in his answer made no claim in respect of the payments of the 200*l.* or the 4,000*l.*; and in two successive charges sent in by him before the Master, he did not make any such claim; but at last, in the year 1817, he produced a charge, in which these sums were claimed with interest.

Held in the court below, and on appeal, that under these circumstances, the claims were barred by *laches* and length of time, notwithstanding the pendency of the accounts; and were properly disallowed in the same account in which H. was charged with monies from time to time, and during the period in question advanced to him by the agents of A.

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ON the 30th of June, 1757, Articles of Agreement were executed by Annesley Gore in the words and figures following:—"I do hereby oblige myself to  
 " pay unto Henry King, Esq. upon his marriage with  
 " my daughter Elinor Gore, (the said Henry King  
 " settling all the estates and money he is now entitled  
 " to on the issue of said marriage, and a suitable  
 " jointure to the fortune I give him,) the sum of  
 " 5,000*l.* sterling. Witness my hand this 30th day  
 " of June, 1757. A. G. If Henry King recovers  
 " the Boyle estate left him by the late Lord Kings-  
 " borough, I in that case oblige myself to pay the  
 " said Henry King at my death, (provided he also  
 " settles said Boyle estate on the issue of said mar-  
 " riage, with an additional jointure on said estate of  
 " Boyle proportionably,) the sum of 5,000*l.* Witness  
 " my hand the 30th of June, 1757. A. G."

At the same time Henry King signed the agree-  
 ment following:—

"I do hereby oblige myself to settle all the estate  
 " and money which I am now entitled to on the issue  
 " of Elinor Gore, and a jointure of 500*l.* a-year. And  
 " if I recover the Boyle estate, I do oblige myself to  
 " settle the same on the issue of the said marriage,  
 " with an additional jointure on the said estate of  
 " Boyle of 500*l.* a-year."

At the time of the execution of these articles there was a suit depending between Henry King and his eldest brother, Sir Edward King (afterwards Earl of Kingston), respecting one of the family estates called the Boyle estate.

The marriage between Henry King and Elinor Gore took place on the day of the date of the articles.

Henry King did not recover the Boyle estate; but

an amicable agreement having taken place between him and Sir Edward King, and a deed pursuant to that agreement, bearing date the 6th of May, 1761, having been executed by them, a private Act of Parliament was passed in Ireland, in the session of 1761, for settling the differences between them; by which it was enacted, according to the agreement, that certain lands, &c. in Ireland, therein mentioned, should be, and they were thereby settled to the use of Henry King for life, with a power to settle a jointure of 500*l.* yearly on his wife, and also with a power to charge the lands, &c. with 6,000*l.* for the portions of younger children, with remainder to the issue of Henry King in tail male, with remainders over.

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By a deed bearing date the 9th of May, 1787, and made between Henry King of the 1st part, Elinor King of the 2d part, and James Stewart and the Reverend Thomas Stewart of the 3d part, reciting the articles; and the Act of Parliament and powers thereby created, Henry King, in consideration of the marriage, and of the sum of 5,000*l.* to which he became intitled as the marriage portion of Elinor King, and in performance of the agreement entered into by him with Annesley Gore, and in execution of the powers to him given by the Act of Parliament, granted and appointed to Elinor King his wife an annuity of 500*l.*, charged upon the lands vested in Robert French and Annesley Gore by the Act of Parliament, and also charged the same premises with 6,000*l.* for the portions of the younger children of the marriage.

This Deed of Appointment was registered on the 9th of May, 1787.

Annesley Gore died on the 4th of November, 1781. By his will, bearing date the 8th of August, 1780, after bequeathing two small annuities and a legacy of

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50*l.*, he directed that all his just debts should be paid out of his personal estate; that the deficiency (if any) in his personal estate to answer the purposes aforesaid, should be supplied and be charged upon his real estate.

He devised all his real estates in Ireland to certain trustees for the use of his daughter Elinor King, and his son-in-law Henry King, and their assigns, for the term of their respective natural lives, without impeachment of waste; and after the determination of that estate, to the use of such of the sons of Henry and Elinor King, and their heirs male, as the said Henry should appoint; and for default of such appointment, then to the use of the issue of the marriage in tail male; and in default of such issue, then to the use of the testator's daughter Mary, the wife of Francis Knox, for her life; and after the decease of Mary Knox, to the use of Francis Knox for his life; and after the decease of Francis Knox, to Francis Knox, junior, second son of Francis Knox, for life; and after his decease, to the use of his first and every other son in tail male; and in default of such issue, to the use of James Knox, father of the Appellant, who afterwards took the name of Gore, third son of Francis Knox, senior, for life; and after the decease of James Gore, to his first and every other son in tail male, with remainder to Henry Knox, fourth son of F. Knox, senior, for life; remainder to his first and other sons successively in tail male; remainder to Annesley, first son of F. Knox, senior, for life; remainder to his first and other sons in tail male; remainder to the Testator's daughter Anne, the wife of Henry Carey, for life; remainder to her husband for life; remainder to Henry Carey, junior, their second son, for life; remainder to his first and other sons successively in tail

male; remainder to Annaesley Carey, their first son, for life; with remainder to his sons in tail successively.

The will then contained the following provision:—  
 “And my will and intention is, that in case and  
 “as soon as my said daughter Mary Knox, or the  
 “said Francis her husband, or the sons or son of the  
 “said Francis and Mary, or either of them, shall, by  
 “virtue of the limitations aforesaid, become entitled to  
 “my said estate, the same shall then be and become  
 “charged and chargeable with the payment of the sum  
 “of 2,000*l.* sterling, to and for the use of the younger  
 “children of the said Henry Carey and Anne Carey  
 “his wife, in manner following (that is to say):—The  
 “sum of 500*l.* to Henry Carey, second son of the said  
 “Henry Carey, and the remaining 1,500*l.* to the five  
 “daughters of the said Henry and Anne, and the survi-  
 “vors and survivor of them, share and share alike.”

He bequeathed all his leasehold interests for years, charged with his debts, to the same uses as his real estate, as near as the law would admit, with a power to his executors to sell such part of his real and leasehold estates as they should think proper for the discharge of his debts: and he appointed Henry King, Francis Knox, and Henry Carey, executors of his will, which was proved by Henry King; who entered into the possession of his real and personal estate.

In the year 1798 a French army landed at Killala, in the county of Mayo, a corps of which, accompanied by a body of rebels then in arms, occupied the mansion-house of Henry King, in the town of Ballina, as their head-quarters.

At the time when the French and rebel army took possession of the mansion-house, a considerable number of deeds and papers of Henry King were deposited there, and were, during the occupation of the mansion-house as aforesaid, taken from the place where they

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had been kept, and a great part of them was lost or destroyed, and the remaining part was, after the retreat of the army, found scattered about in a state of confusion.

Search was made among the remains of the deeds and papers of Henry King, and at the house of Lord Lorton, his executor, for the original articles, but they could not be found. The secondary evidence of their contents rested on the following proofs, viz. :—the recital in the Act of Parliament, and in the deed of appointment; a copy of the articles, in the hand-writing of Henry Dixie Lyster, the clerk of William Lyster, who had been the attorney of Annesley Gore and of Henry King; a case which had been laid before Theobald Wolfe, a barrister, about the month of August, 1782, in the hand-writing of Henry Dixie Lyster, and referring to a copy of the articles, and on which case, Theobald Wolfe wrote that he had read the copy; and the bill of costs of Lyster, which appeared to have been paid by Henry King to William Lyster by bills of exchange drawn by Henry King on Messrs. Latouche, bankers, in which Lyster charges the cost of preparing the case and copy of the articles, and laying the same before Theobald Wolfe. It was also proved that the case, the copy of the articles, and the bill of costs, were found among the papers of Henry King, and that both William Lyster and Henry Dixie Lyster were dead.

The object of laying the case before Theobald Wolfe was to obtain his opinion whether the trustees named in the will of Annesley Gore, or Henry King, Francis Knox, and Henry Carey, could, by a sale or mortgage of a competent part of the estates of Annesley Gore, raise a sum for the payment of the marriage portion, and the interest thereof, under the power

given them by the will, to sell and dispose of such part of his real freehold and leasehold estates as they should think proper, for the discharge of the debts of Annesley Gore.

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Elinor, the wife of Henry King, died in the year 1789, without having had issue.

On the 2d of December, 1814, Annesley Knox, Henry Knox, Arthur Knox, and John Knox, as executors of Francis Knox, exhibited their bill in the High Court of Chancery of Ireland against Henry King, Mary Knox (since deceased), then the widow of Francis Knox, and the then next tenant for life of the testator's estates expectant on the death of Henry King, James Knox Gore, since deceased, the then next tenant for life of the testator's estates expectant on the decease of Henry King and of Mary Knox, (his elder brother, Francis Knox the younger, having previously died without issue male), and also against the appellant, Francis Arthur Knox Gore, then a minor, the eldest son and heir apparent of James Knox Gore and first tenant in tail of the estates under the will, and against several others, in order to recover the amount of certain judgment debts affecting the estates that had so as aforesaid belonged to the said Annesley Gore in his lifetime.

Henry King answered the bill on the 3d of June, 1815, being then eighty-four years of age, and he by his answer admitted the plaintiff's demands, but denied that he was bound to pay them, having paid very large sums out of his own funds in discharge of the debts due by Annesley Gore at his decease, over and above the amount of the personal estate of Annesley Gore, for which sums he prayed by his answer to stand in the place of the creditors whose debts he had so discharged out of his own

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funds, and to have the same decreed to be charges against the real estates of Annesley Gore.

The cause was heard before the Lord Chancellor of Ireland on the 25th of February, 1817, when it was decreed that the will of Annesley Gore was well proved, and that the trusts thereof should be carried into execution; and accordingly it was referred to one of the masters to take accounts; of the sums due to the plaintiffs on their judgments; of the personal estate of the testator, with the nature and amount of such personal estate; into whose hands same had come, and how the same had been applied and disposed of; also an account of the testator's debts, legacies, and funeral expenses: and in taking such accounts the master was directed to inquire and report whether any and which of the debts of the testator due at his decease had been paid by Henry King; and if he should find that Henry King had paid such debts, he was then to inquire and report out of what funds he had paid such debts, and if he should find that Henry King had paid any of the debts out of his own funds, then it was declared that Henry King should be entitled to stand in the place of the creditors whose debts he should have so paid.

Upon this reference the plaintiff filed a charge on the foot of the judgments, and proved the same; and on the 9th of September, 1817, Henry King filed a charge with two schedules, containing the particulars of such debts of Annesley Gore as had been paid by Henry King. In the second schedule to the charge, the following items were inserted:—"To the amount of money remaining due by the said Annesley Gore at the time of his decease to said defendant, and of sums paid by said defendant for said Annesley Gore ———l. To principal sums due on foot of other bonds, and on foot of other judgments obtained

against said Annesley Gore at the time of his decease, paid by said defendant ———l.”

An additional charge was afterwards filed on behalf of Henry King, claiming the principal sum of 3,000*l.* on the foot of the marriage portion, with the sum of 4,382*l.* for the interest thereof, from the date of the marriage articles to the day of the death of Annesley Gore:

Henry King not having been able to discover the original articles of the 30th of June, 1757, the same could not be produced or proved before the master on taking the account, but the secondary evidence before stated was laid before the master.

James Knox Gore, on the 3d day of October, 1817, caused personal interrogatories to be administered to Henry King. He, in his answer, did not claim credit for certain sums afterwards claimed, of 400*l.* and 2,000*l.*, or the interest thereof. And as before he claimed only the principal sum of 3,000*l.* on the foot of the portion, and 4,382*l.* interest.

On the 20th of March, 1819, a further charge was filed on behalf of Henry King, on foot of the principal sums of 400*l.* and 2,000*l.*, and the interest thereof, which was claimed as due for monies paid by Henry King on account of Annesley Gore; it was entitled the further charge of Henry King, containing further particulars of the second item in the second schedule to the original charge of the said Defendant.

The Master, in taking the account, ruled that the portion of 5,000*l.* did not bear interest, and deducted from the amount of the principal sum of 5,000*l.* the sum of 2,697*l.*, from time to time paid by Annesley Gore's agents to and for Henry King, and by his report, bearing date the 1st of May, 1824, found that the sum of 2,303*l.*, and no more, remained due to Henry

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King, on the foot of the 5,000*l.*, at the time of the death of Annesley Gore, although the Respondent insisted that after the aforesaid deduction, he was manifestly entitled to interest on the foot of the marriage portion, from the 30th day of June, 1757, the date of the marriage articles, to the 4th day of November, 1781, the day of the death of Annesley Gore, and to have the said 2,697*l.* set off against the said two sums of 400*l.* and 2,000*l.*, and the interest thereof, which was also the desire of the Appellant, as appears by one of the exceptions filed by him to the report, in case the Master allowed the Respondent credit for the two last-mentioned sums.

In respect to the 2,000*l.* charged upon the estates, in favour of Henry, the second son of Henry Carey, and the surviving daughters of Henry and Anne Carey, in case Mary Knox, or Francis her husband, or the son or sons of Francis and Mary, should, under the limitations, become intitled to the estate; a charge was filed by the assignee of Henry, the second son of Henry Carey, and two surviving daughters, the Respondents Cuddy, Carey, and Kelly, to whom respectively the Master reported the principal sum of 2,000*l.*, with interest, to be due, in the proportions specified in the will.

Pending the account, Henry King died, at the age of ninety-one years, having made his will, and appointed the Respondent sole executor; and the Respondent having obtained probate of the will, the cause was revived against him. The report of the Master having been filed, the Appellant took several exceptions thereto. The third exception was, because the Master had applied several sums of money, amounting to the sum of 2,697*l.* in liquidation of the sum of 5,000*l.*, the portion of Elinor King, whereas he ought to have debited the Respondent with such several sums

-of money, amounting to the sum of 2,697*l.*, as so much money paid to and received by Henry King, to the use of Annesley Gore; or if the Master was warranted in making any specific application thereof, the same should have been applied, in the first instance, towards the discharge of the sums of 400*l.* and 2,000*l.* in the Appellant's first and second exceptions mentioned.

The ninth exception was, because the Master allowed a credit to the Respondent for the sum of 5,000*l.*, the portion of Elinor King; whereas the Master was not warranted by the evidence or by law, to allow any sum on foot of the portion.

An exception to the report was also filed on behalf of the Respondent; because the Master had only allowed credit to the Respondent for 2,203*l.* for the balance due on foot of 5,000*l.*, the portion of Elinor King; whereas he should have allowed to the Respondent the principal sum of 3,000*l.* and 4,382*l.* 10*s.*, the interest thereof, from the 30th of June, 1757, to the 4th of November, 1781, making together 7,382*l.* 10*s.*

As to the 2,000*l.*, with interest, reported due to the Respondents Cuddy, Carey, and Kelly, the Appellant excepted to the report on the ground that it was not upon the events a charge affecting the estate.

The cause was heard on the report, exceptions, and merits, on the 26th, 27th, and 28th days of July, 1824, when no question was raised respecting the existence or due execution of the marriage articles of the 30th of June, 1757, but only as to the right to interest on foot of the portion.

The exception, as to the 2,000*l.*, was overruled.

Upon the third and ninth exceptions of the Appellant, and on the exception filed on behalf of Respondent, it was referred back to the Master, to take an

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account of the sum due on the foot of the portion, the court declaring, that the portion was payable, with interest, from the day of the marriage of Henry King and Elinor Gore, and that the Respondent was not entitled to credit for the sums of 400*l.* and 2,000*l.*

Against this decretal order, there was an appeal by the plaintiff in the suit below, and a cross appeal by Lord Lorton, as executor of Henry King.

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Upon the direct appeal, it was contended, on behalf of the Appellant, that there was not a sufficient foundation laid in evidence to entitle the Respondent Lord Lorton to read secondary evidence of the alleged articles of the 30th of June, 1757, and that there was not any proof before the court of the said articles: That it did not appear that the sum of 5,000*l.* claimed under the articles of 1757, was at any time an existing charge against the Appellant's estate. The alleged articles of 1757 rested on mutual and dependent covenants, and the portion was not to be thereby payable until Henry King should settle on the issue of the marriage the estate and money he was then entitled to, and make a jointure for his wife pursuant to his covenant, which covenant did not appear ever to have been duly performed, and therefore it was argued that no debt existed on the foot of the sum of 5,000*l.* claimed by the Respondent Lord Lorton, even supposing the alleged articles to have been executed. If the sum of 5,000*l.* was a debt existing from the date of the articles, or at the marriage of Henry King with Miss Gore, it was barred by length of time, before the death of Annesley Gore, which did not take place for more than twenty-four years after the marriage, and the date of the articles, and should be presumed to

have been paid by Annesley Gore: and not being a debt due by Annesley Gore, at the time of his death, it could not be a charge on his real estate under his will.

If the execution of the alleged deed of 1757 made the sum of 5,000*l.* a debt of the testator, it could only have been a debt due and payable from the execution of the deed of 1787, the sum of 5,000*l.* not being sooner payable, if at all. Supposing the sum of 5,000*l.* to be a charge on the estates, it did not appear, from the copy of the articles of 1757, that interest was to be payable on the sum of 5,000*l.* therein mentioned, and now claimed by the Respondent Lord Lorton, and there is no evidence of a demand made of the principal sum, or any part thereof, from Annesley Gore. If interest was payable, it is, under all the circumstances, to be presumed, that all interest on the sum of 5,000*l.* was paid during the lifetime of Annesley Gore, and by the bill, filed by Henry King in 1788, he claims a balance of 3,000*l.* only, to be due on the alleged charges; and even if the settlement of 1787 were to be considered as a performance, by Henry King, of his covenant, in the alleged articles of 1757, it would not entitle him, or the Respondent Lord Lorton, to interest from the marriage, by relation back. Supposing the interest to have become in arrear, at the death of Annesley Gore, it is to be presumed, that Henry King, who received the rents and profits of the estates of Annesley Gore, retained the interest thereof; and at all events the decree or decretal order should not have decreed an account to be taken on the foot of the interest of the 5,000*l.*, without decreeing an account of the rents and profits received by Henry King who was bound to keep down the interest out of the rents, if the real estate was charged with the 5,000*l.*

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As to the 2,000*l.*, the estate of Annesley Gore was only to become chargeable with the sum of 2,000*l.* in the event of Mary Knox, or Francis Knox, her husband, or the son or sons of Francis or Mary becoming entitled to the estate, which event has not yet taken place, and it does not appear that the testator intended to charge his estate at all events.

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For the Respondent it was contended, that if the question of fact were now open, (which the Respondent submitted it was not, not having been made the ground of any distinct exception to the Master's report, nor any question raised thereon, upon the hearing below,) there is sufficient proof of the existence, loss, and contents of the marriage articles of the 30th of June, 1757, whereby Annesley Gore bound himself by deed, to pay to Henry King the sum of 5,000*l.*, as the portion of Elinor Gore, the daughter of Annesley Gore: that Henry King was entitled to receive interest on the marriage portion, inasmuch as the portion was payable immediately upon the celebration of the marriage, and he had by articles bound himself to settle all his property on the issue of the marriage, and a jointure of 500*l.* a year on Elinor, and by his marriage with Elinor, he subjected himself to her immediate support suitable to her rank in life, and to the support of the issue of his marriage, and if he had died at any time after the celebration of the marriage, Elinor would have been entitled under the articles, to an annuity or jointure of 500*l.* a year, charged on all the property of Henry King, and the issue (if any) of the marriage would have been entitled to all his property, subject to the jointure, though Henry King had not executed any deed of settlement in pursuance of the articles.

Although the right of Henry King to enforce the

actual payment of the portion and the interest thereof, might be postponed until he had executed a deed securing to Elinor, and the issue of the marriage, the provisions intended for them by the articles: yet a delay in executing such a deed cannot affect his right to receive the interest of the portion, from the date of the marriage; for the articles having been executed for the valuable consideration of marriage, a court of equity would have compelled the specific execution of the agreement therein contained on his part.

Henry King did by deed of appointment of the 9th of May, 1787, make such provision for Elinor, and the issue of the marriage, as by the marriage articles he was bound to make for them. And he thereby at least entitled himself to be paid the portion with interest from the beginning.

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The cross appeal turned upon the following facts :

In the year 1758 Annesley Gore became indebted by bond to one Anne Henry in the sum of 1,000*l*. In 1761 Henry King paid 400*l*. in part of the debt owing upon the bond. In 1764 Annesley Gore became indebted to the Bishop of Killala by bond, in the sum of 2,000*l*. On the 6th of December, 1764, Henry King paid the money due on the bond. Between the years 1757 and 1775, Annesley Gore paid to Henry King various sums of money, amounting to 2,697*l*. In the answer filed in 1815, by Henry King, to the bill for ascertaining and raising the charges upon the real assets of Annesley Gore, as before stated, Henry King made no claim in respect of these payments of 400*l*. and 2,000*l*. After the decree in September, 1817, Henry King brought into the master's office, a charge on the foot of debts of Annesley Gore paid by Henry King. These payments were not in-

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cluded in that charge. In October, 1817, he was examined upon interrogatories. In his answer he made no claim in respect of these payments. But in March, 1819, a further charge was filed on behalf of Henry King, claiming the sums of 400*l.* and 2,000*l.* with interest from the respective times of payment, and the Master having reported in favour of these claims, exceptions were taken to his report, which, on hearing the cause in 1824, were allowed as to the 400*l.*, on the ground that the debt had been discharged by the application of bills, to the amount of 396*l.*, sent by Annesley Gore to Henry King; and as to the 2,000*l.*, on the ground that the claim had been barred by the statute of limitations.

Against the decree and order allowing these exceptions, the cross appeal by Lord Lorton was presented.

For the Appellants in the cross-appeal—

Francis Arthur Knox Gore did not by any exception to the report, claim credit for the sum of 396*l.* mentioned in the decree or order, but had submitted to the Master's decision in respect thereof, the Master having refused to give him credit for that sum, and no exception having been taken to the report on that account. It did not appear by any evidence in the cause that bills to that or any other amount, were sent by Annesley Gore to Henry King; the only evidence relating to the bills being an entry in the account book of Francis Moran, dated the 15th November, 1761, in the following words and figures,—“Bills to Mr. Gore to send to Henry King, Esquire, 396*l.*” which is certainly evidence of nothing more than that those bills were handed to Mr. Gore, but no evidence of what further use they were applied to by him.

Supposing it had been proved that the bills had

been sent by Annesley Gore to Henry King, it would have been necessary to have shewn that the 398*l.* was paid on account of the sum specified in the exception.

As to the second exception, an executor is not bound to insist on the statute of limitations, in bar of a fair demand, and is no more bound to insist upon it against his own demand than against any other.

Supposing the statute of limitations might have been set up as a bar to this demand of the Appellant, Francis Arthur Knox Gore did not rely on it, or allege it as a bar before the Master, or in his exceptions to the report, and therefore ought not to have had any benefit from the statute at the hearing on the exceptions.

Francis Arthur Knox Gore had been allowed credit by the Master in the account, on the foot of the marriage portion of 5,000*l.* for the several sums of money paid to Henry King, from time to time, in the lifetime of Annesley Gore, in the report specified, amounting altogether to the sum of 2,697*l.*, the greater part of which had been paid by Annesley Gore to Henry King between the time of the payment of the sum to the bishop of Killala, and the death of Annesley Gore, not one of which sums appears by the Master's report to have been paid on any particular account; and the payments so made to Henry King, subsequent to the payment made by him of the sum of 2,000*l.* to the bishop of Killala, ought therefore to be presumed to have been paid to Henry King on account of the sum of 2,000*l.* which he had advanced to the bishop of Killala, or the amount thereof, and might have been so applied.

However the sums were to be applied, it appears by the Master's report, that not one of the sums was paid within six years previous to Annesley Gore's

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decease. And therefore the statute of limitations ought not to have been allowed in bar of Appellant's right to credit for the 2,000*l.* so paid to the bishop of Killala, and the interest thereof, without expressly directing that the Appellant should not be charged in any way with the sums amounting to 2,697*l.*, the statute of limitations operating in bar of the whole of the sums comprised in the said sum of 2,697*l.* upon any principle on which it can be held to operate against the Appellant's having credit for the 2,000*l.* so paid by Henry King, to the bishop of Killala. The Appellant ought either to have credit for the sum paid by Henry King to the bishop of Killala, or he ought not to be charged with the sum paid by Annesley Gore to Henry King; for if on the principle of there being cross demands and a running account between the parties, the items on one side are taken out of the statute, so also must those on the other side.

For the Respondent—

As to the First Exception: It appears by the receipt of the 18th of December, 1761, upon which the claim of 400*l.* and interest is founded, that the payment was made by Annesley Gore, and that Henry King was only the agent in making it, and must be taken under the circumstances, and particularly at this distance of time, to have procured from Annesley Gore funds to enable him to make such payment.

If such a debt ever existed, this payment must, from the length of time that elapsed between the time of payment and the death of Annesley Gore, nearly twenty years, be presumed to be satisfied, and more especially as Annesley Gore was a man of considerable property, and such presumption is strengthened by the fact of Henry King, who survived Annesley Gore a number of years, not having made any claim on the foot of such payment until the year 1819.

It appears that the said sum of 400*l.* was discharged by the application of bills sent by Annesley Gore to Henry King.

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The balance due upon the bond (after payment of 400*l.*) was paid by Annesley Gore, and the security taken up by him and cancelled by cutting off the seal, and under such circumstances, and in such state, the bond came into the hands of Henry King as executor of Annesley Gore, with all his other papers, and upon the death of Henry King came into the hands of the Appellant as executor of Henry King, and King's possession of the bond is consistent with the fact of the discharge of the whole amount thereof, by and with the money of Annesley Gore. If such a debt ever existed, it was barred by the statute of limitations in the lifetime of Annesley Gore.

As to the Second Exception : The sum of 2,000*l.* in this exception mentioned does not appear to have been a payment made on account of, and for the proper debt of Annesley Gore, who was one only of two obligors in the bond ; it might have been a payment for the debt of his co-obligor, or of Henry King himself, who held valuable renewable interests as tenant under the see of Killala.

If the payment was made on account of Annesley Gore, it should, under all the circumstances, at this distance of time, and especially as no claim was made on the foot of such payment until the year 1819, be presumed that Henry King (who acted as agent for Annesley Gore, in making other payments from the funds of Annesley Gore), had made such payment also with Annesley Gore's money, and not from the private funds of Henry King.

The production of that bond by the representative of Henry King is not in itself evidence that the pay-

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ment thereof was made with the money of Henry King, inasmuch as Henry King acquired possession of all the papers of Annesley Gore as his executor, and the papers afterwards came into the possession of the Appellant as executor of Henry King.

The Lord Chancellor.—This was the case of an appeal from an order of the Lord Chancellor of Ireland, on exceptions taken to the Master's report : the exceptions are many in number, and embrace a great variety of complicated facts and considerations. It will not be necessary for me in suggesting the course to be pursued in this case to trouble your Lordships with all the particulars to which I have adverted. I will endeavour to confine the observations I have to make upon this case to those material points which in the course of the argument have been pressed on the consideration of the House.

Upon these exceptions one question related to the interest of certain persons of the name of Carey ; two of them were the daughters of the third daughter of Annesley Gore. The question arose upon the construction of the will of Annesley Gore. I think that the interpretation which was put upon that part of the will by the Lord Chancellor of Ireland was perfectly correct, and so clear as to afford no reasonable ground whatever for doubt. I should therefore recommend that that part of the judgment of the court below should be affirmed.

The material question for consideration arises out of certain articles which were executed as far back as the year 1757, upon the marriage of the daughter of Annesley Gore with Mr. Henry King. One question, which was argued at great length at the bar, was of this nature, as to whether or not there was suf-

ficient evidence of the contents and the execution of those articles. Now, in the first place, advertng to the form of the exception to the Master's report, it does not appear to me that the question is raised with respect to the sufficiency of the evidence as to the existence or contents of those articles. The terms of the exception are not such as very distinctly to raise that question, nor do I believe it was ever intended to raise that question. It is true that the terms, perhaps, are sufficiently large to embrace it. The exception is in these words : " For that the said Master by " his said report allows a credit to the said Viscount " Lorton for the sum of 2,303*l.*, being an alleged balance of a sum of 5,000*l.*, the alleged portion of Eli- " nor Gore, one of the daughters of Annesley Gore, on " her marriage with the said Henry King, on foot of " the said alleged portion." Whereas the said Master was not warranted by evidence or law to allow any sum on foot of the said portion. There are questions existing in this case quite sufficient to satisfy these terms of the exception that the " Master was not warranted by " evidence or law to allow any sum on the foot of the " said portion ;" and therefore, although the terms of that exception, perhaps, are large enough to embrace a question of this kind, I do not think it was the intention of the parties at the time when that exception was framed to raise this particular question, for I think as an objection was taken in the Master's office to the evidence for the establishment of those articles, if it had been intended before the Court of Chancery to agitate this question, the terms of the exception would have pointed to it more distinctly: It is stated in the Respondent's case (and there is nothing to throw doubt upon it in the case on the other side) that in point of fact this objection was not insisted upon in the Court of Chancery : it is stated that some

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allusion was made to it, but that so far from its being insisted upon, it was actually abandoned at the bar by the counsel. That was stated at the bar of the house in the course of the argument, and I did not hear it denied on the other side. I have since had some conversation with the noble and learned Lord before whom the case was heard, who, according to the best of his recollection, does not consider that this question was agitated at the bar of the Court of Chancery, but that the main question which was there agitated, was, whether or not Henry King, or the representatives of Henry King, were entitled to a claim of interest made upon the sum contained in those articles; and if in the result it should turn out that the question was not raised in the Court below, or when alluded to was abandoned, the House will not allow such an objection to prevail, coming here *per saltum* for consideration, and now raised for the first time at the bar of the House, especially a question of this nature.

But I would beg leave to call your attention to the evidence for the purpose of establishing the existence and the execution of this instrument, because I think it is impossible to advert to that evidence and to entertain any doubt whatever that these articles in this form did exist, and that they were executed by Annesley Gore.

Upon this enquiry, as the articles themselves were not produced before the Master, evidence was brought forward for the purpose of giving a satisfactory account of their having been lost or destroyed, and that evidence was of this description. These articles were supposed to have been executed in the year 1757. In the year 1798, in consequence of the rebellion which at that time existed in that part of Ireland, a body of troops, consisting of Irish rebels and French troops, took possession of the house of Mr. Henry

King; they established their head-quarters in that house, and held possession of it for a very considerable time; and a witness who gave evidence in the progress of this cause, proved that he was upon the premises at the time, and that all the closets and drawers were ransacked, and all the papers and deeds were scattered about the different rooms of the house: It is natural, therefore, to suppose, that under such circumstances, many of them must have been destroyed. Henry King was the representative and executor of Annesley Gore; if there were two parts, therefore, of this instrument, they would come into the possession of Henry King. Lord Lorton was the executor of Henry King: with a view to this enquiry; and with a view to this cause, the premises at Ballina, which was the house of Henry King, were searched for the purpose of discovering those articles, and the depositories of Lord Lorton, who was the executor of Henry King, containing any papers belonging to Henry King, both in Dublin and the country, were searched and carefully examined, and there was no trace whatever of those original articles. Upon this evidence, it was competent for this purpose, to admit secondary evidence of the existence, execution, and contents of these articles.

Now that evidence was of this description: Annesley Gore died in 1781, the articles having been executed in the year 1757. The very year after his death, Henry King, by means of Mr. Lyster, his attorney, stated a case for the opinion of Mr. Wolfe (at that time Attorney-General for Ireland, and afterwards Lord Kilwarden), with reference to those very articles. The object of the case was to ascertain whether or not a part of the property of Annesley Gore might be sold for the purpose of discharging this debt. In the case

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itself, the substance of the articles was set out, but the case referred to a copy of the articles by which the case was supposed to be accompanied; there was an opinion upon the case in the hand-writing of Mr. Wolfe, which hand-writing was proved, and Mr. Wolfe, in his own hand-writing, has said with reference to the copy which is stated to have accompanied the case, "I have read it;" there is no doubt, therefore, that the case for the particular purpose to which I have referred was laid before Mr. Wolfe in the year 1782, the year after the death of Mr. Annesley Gore, that case being wholly written by a son of Mr. Lyster, who was the attorney of Mr. King, and had been the attorney of Mr. Annesley Gore.

There is also a bill of costs which was found among the papers of Mr. Henry King, in the hand-writing of Mr. Lyster's son, adverting to this very case, and making a charge for it, which bill of costs is proved afterwards to have been paid. Under such circumstances, therefore, it can hardly be supposed that the copy which was thus sent to Mr. Wolfe for his opinion with reference to the subject to which I have adverted could have been any other than a genuine copy of the instrument; and the instrument probably existed at that time, for that was in 1782, many years before this supposed destruction of the instrument, by the means to which I have adverted, which was in the year 1798.

In an act of parliament passed in the year 1764, a very few years after the date of the execution of those articles, a power is given to charge those estates which belonged to Mr. Henry King, with a jointure of 500*l.* a-year; and in the year 1783, a settlement is made on Henry King under this power, corresponding exactly with the sum mentioned in the articles.

Now, taking this evidence, and taking all the circumstances of this case together, I think I should do wrong in suggesting to your Lordships any other course than that of confirming that part of the decree which relates to those articles. I am of opinion that I cannot, under these circumstances, recommend to your Lordships to set aside the decree, on the ground that there is no sufficient evidence to satisfy your Lordships that those articles did exist in the form in which they are represented in the copy, and that they were executed by Mr. Annesley Gore: I think if I did I should give your Lordships improper advice in a case of this description, particularly where there is great reason to doubt, whether this question was raised at the hearing in the court below. I think I ought not to recommend to your Lordships to reverse any part of this decree founded on the supposition that there was not sufficient evidence of the existence of those articles.

The only material question that remains to be considered, is the question of interest. That question arises out of the construction of the articles. The articles are in these terms. I have already read them, but I will advert to them again, to shew the precise terms on which the question depends.—“ I do hereby,” says Mr. Annesley Gore, “ oblige myself to pay unto Henry King, Esquire, upon his marriage with my daughter, Elinor Gore; and the said Henry King settling all the estates and money he is now entitled to on the issue of said marriage, and a suitable jointure to the fortune, I give him the sum of 5,000*l.* sterling:” it should seem, that after that part of the articles had been written, some treaty or negotiation must have existed between the parties, because your Lordships will find, that it is upon Mr. Henry King

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making a suitable jointure to the fortune I give him, which is a sum of 5,000*l.* sterling. In a note written at the bottom, and signed by Mr. Henry King, he says, "I do oblige myself to settle all the estate and money which I am now entitled to on the issue of Elinor Gore, and a jointure of 500*l.* a year;" so that it should seem, that between the period when the original memorandum was made by Mr. Annesley Gore, and the period of the memorandum adopting his proposition, signed by Mr. Henry King, who was to make a suitable jointure, according to the memorandum signed by Mr. Annesley Gore, that was settled between them as a jointure of 500*l.* a year; and he says, therefore, in answer, "I do hereby oblige myself to settle all the estate and money which I am now entitled to on the issue of Elinor Gore, and a jointure of 500*l.* a year; and if I recover the Boyle estate, I do oblige myself to settle the same on the issue of said marriage, with an additional jointure on said estate of Boyle, of 500*l.* a year:" with respect to the Boyle estate, it is not necessary to advert to that matter, for it does not appear that he recovered the Boyle estate.

Now what took place upon that? It appears that there was an obligation on the one party to pay 5,000*l.*; there was an express distinct obligation on the other to settle all the money to which the party was entitled, so as to create a jointure of 500*l.* a year; there were mutual obligations of this description. What took place? It appears that there was at this period a contest between Henry King and his brother, Sir Edward King, with respect to a considerable part of the property in controversy. That was carried on for a considerable period, and at last, in 1762, it was settled by a mutual arrangement between the parties.

For the purpose of confirming the arrangement, an act of parliament was passed, and it appears, that by that act of parliament all the property which this gentleman, Mr. Henry King, was entitled to, all the real property he was entitled to, was included in that act of parliament, and became the subject of a settlement under that act. Now the settlement under that act of parliament, so far as it is necessary to state it, is of this description:—Mr. Henry King took an estate for life, with remainder to his issue in tail; there was a power to raise 500*l.*, for the purpose of a jointure to Mrs. Elinor King his wife, and a portion, not exceeding a sum of 6,000*l.*, for his younger children. If this power had been immediately executed, that would have been a fulfilment, as far as the real property was concerned; and it does not appear that he was possessed of any personal property; but in point of fact the power was not immediately executed, owing to some accidental circumstances which are not sufficiently explained in this case. It was not till the year 1787, but still during the lifetime of Mrs. King, that this power was executed; there was then a settlement executed, referring to these marriage articles, an appointment by which she was to have 500*l.* a year, and 6,000*l.* was settled for the use of the younger children. In 1787, therefore, these articles were completely fulfilled, as far as the real property was concerned; and it does not appear that there was any personal property, as far as the interests of Mrs. King were concerned. Her interests, therefore, were completely satisfied by the execution of this instrument, which was executed during her lifetime, and she had the full benefit of this stipulation. The 5,000*l.* was to have been paid upon the marriage; the stipulation on the part of

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Mrs. Henry King, which was a binding obligation upon him, was, that he would execute an instrument of a particular description, which settlement was afterwards executed so as to give Mrs. Elinor King, the wife, the full benefit of it. As the money was not paid at the time when it ought to have been, it follows, I think, that interest ought to be charged according to the opinion of the court below (which I think was perfectly correct), from the period of the date of the marriage, when the money ought, in point of fact, to have been paid; I think that is the proper construction of this argument, and under these circumstances, I am clearly of opinion, that this part of the judgment of the court below was perfectly correct.

There is another question relating to sums of 400*l.* and 2,000*l.*, which were monies supposed to have been paid by Mr. Henry King to the Bishop of Killala and others. With respect to that transaction, considering the time at which it was brought forward, considering the course pursued by Mr. Henry King himself, and considering the late period at which any claim was made on the part of Mr. Henry King, taking all circumstances into consideration, I am of opinion, that the judgment of the court below was just and proper in disallowing these claims.

I have referred to the cross appeal, and the minute considerations arising out of it, and I have read the papers with great attention. I should detain your Lordships too long if I were to go into them. I think it will be sufficient to say I am satisfied that the course pursued by the Court of Chancery in Ireland was correct, and that upon the whole, with reference to all the parts of it, this judgment ought to be affirmed.

With respect to costs in this case, it was a case of

great complexity, embracing a great many considerations, and perhaps it will be too much to say that it was not properly brought under the consideration of your Lordships; under such circumstances it may be proper to move that it be affirmed without costs. With respect, however, to the question of costs, I would take a little time to consider as to part of them; the question arising out of the claim of the two Careys and Mr. Cuddy, the representative of one of them. I think that with respect to that part of the case which appears to me too clear to admit of doubt, your Lordships might give an opinion that these parties were entitled to their costs; the rest is altogether so complicated, and involves so many questions of fact, and so many considerations of law, that perhaps it will be better to affirm the decree without costs. The difficulty and complexity of cases in the courts in Ireland, arises out of the extent of the causes in point of time. This originated out of articles executed in 1757, and out of an account, the first item of which was about the year 1760. It is not matter of surprise, therefore, that there should be complexity as to the facts and as to the law arising out of these circumstances.

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Judgment affirmed.

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(COURT OF CHANCERY.)

ROGER MONTGOMERY HAMILTON }
M'NEILL, and DANIEL M'NEILL. } *Appellants.*

MICHAEL CAHILL & ROBERT GROVE }
LESLIE - - - - - } *Respondents.*

The House of Lords having made an order, containing declarations as to the rights of parties, and remitting the case to the court below, with directions; it is not competent to the court below, upon the same state of evidence, to give any judgment inconsistent with the declarations and directions of the House of Lords.

THE order which was made by the House of Lords in this cause, as reported *ante*, vol. ii. (1st ser.) was, by an order of the Court of Chancery in Ireland, dated on the 6th of November, 1820, adopted, and made an order of that court.

Upon the reference which took place upon that order, the Master made a Report on the 31st of January, 1821, the material parts of which are incorporated in the following (among sixteen) exceptions, which were taken to the Report by the Respondent, Michael Cahill:—

First Exception.—For that the Master has by his said report found that Roger Hamilton M'Neill, the father of the Plaintiff Roger, had no right to sell the estate of Taynish; whereas the Master, on the evidence laid before him, should have found that the said Roger Hamilton M'Neill had a right to sell the estate

of Taynish, and therefore the Defendant Michael Cahill excepts to said report.

Second Exception.—For that the said Master has also in and by his said report stated, that the interest of the said Roger Hamilton M'Neill, in the purchase-money arising by the sale of the Taynish estate, after paying the heritable debts, amounting to 9,000*l.*, and the sum of 2,000*l.* the fortune of Defendant Cahill's late wife, viz. the sum of 10,000*l.* British, was that of tenant for life, and that the said son of Plaintiff Roger Montgomery Hamilton M'Neill, upon his death was entitled to the said sum, and by the law of Scotland had a claim in respect thereof, upon the estate of his said father, in the hands of the Defendant Cahill, as his executor; whereas the Master, upon the evidence laid before him, should have reported that the said Roger Hamilton M'Neill was not mere tenant for life of the said purchase money, but had the absolute interest therein, and that the Plaintiff Roger Montgomery Hamilton M'Neill was not, upon the death of his said father, entitled to the said sum of 10,000*l.* or any part thereof, and had not by the law of Scotland, in respect thereof, a demand against the estate of his said father, in the hands of the Defendant Cahill, as his executor.

Third Exception.—For that the said Master has, in and by his said report, found that the Plaintiff Roger Montgomery Hamilton M'Neill did not by his interference with the rents of the Raplock estate, as it appeared in evidence before him, forfeit his right under the settlement of 1743, in said Report mentioned, or his claim to the money arising from the sale of the said Taynish estate; whereas, etc.

Fourth Exception.—For that the said Master has, in and by his said Report, found that certain suits were

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instituted by the Plaintiff Roger Montgomery Hamilton M'Neill, in the Scotch courts, respecting the will of his said father, but has not reported, as he ought to have done on the evidence before him, that such suits related also to part of the purchase money of the said Taynish estate, which was claimed by the Defendant Cahill, as executor of the said Roger Hamilton M'Neill, deceased. And in which suits the said Plaintiff Roger Montgomery Hamilton M'Neill was an intervenient party, and claimed the same likewise.

Fifth Exception.—For that even supposing that the said Roger Hamilton M'Neill had, as reported by the said Master, no right to sell the estate of Taynish, and that his interest in the purchase money arising from the sale thereof, was that merely of tenant for life; and that his son the Plaintiff Roger Montgomery Hamilton M'Neill became entitled to the said sum of 10,000*l.*; part of said purchase money, and by the law of Scotland had a claim in respect thereof, upon the estate of his father; yet upon the evidence before the said Master, and particularly by the said proceedings in the said courts of Scotland, and the discharge and disclamation in said report mentioned, he should have found that the said Plaintiff Roger Montgomery Hamilton M'Neill had extinguished all claim against his said father's estate in the hands of the said Defendant Cahill, as his executor; and therefore Defendant Cahill excepts to the said report.

Sixth Exception.—For that the said Master has stated in his said report that the said Roger Montgomery Hamilton M'Neill, upon the death of his said father, was entitled to the said sum of 10,000*l.*, and, by the law of Scotland, had a claim in right thereof against the estate of his said father, in the hands of Defendant as his executor, without sufficient evidence to warrant

him to do so: and therefore the Defendant Cahill excepts to the said report.

The cause was heard on the report, exceptions, and merits, in March, 1825, when the Lord Chancellor overruled the first and also the second exception, so far as the same depended on the construction of the deed of the 15th day of June, 1743, in the pleadings mentioned, but subject to the order to be made, on the result of the evidence produced before the Master, in regard to the fifth and sixth exceptions, and he overruled the third exception, subject to the order to be made on the fifth and sixth exceptions, and he allowed the fourth exception generally, and he also allowed the fifth and sixth exceptions, it being, as he declared, very doubtful from the transaction between the parties, the decree, and disclaimer, and all the other evidence in the cause, whether (the Appellant having in the year 1782 ratified the sale of Taynish) he had received any part of the produce thereof, or had in any manner compromised his rights thereto, no claim having been made in respect thereof until the year 1807 or 1808, and it being impossible, after the deaths of Roger Hamilton M'Neill, the father, and Dr. M'Neill, to ascertain (if any thing was due to the Appellant in that respect) the amount thereof; and the Lord Chancellor overruled the seventh, eighth, ninth, thirteenth, fourteenth, fifteenth, and sixteenth exceptions; and also the tenth, eleventh, and twelfth exceptions, subject to the return of the Master's report, and he referred it to the Master, to take an account of the rents of the purchased lands in the pleadings mentioned, received by the Appellant Roger Montgomery Hamilton M'Neill, from 1789 to the year 1816, when the Respondent got into possession, and also to take an account on the foot of

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the principal and interest of the purchase money in the pleadings mentioned during the same period; and directed that a balance should be struck thereon, and in case any balance should appear to be due to the Appellant, Roger Montgomery Hamilton M'Neill, on such account the same, with interest thereupon, down to the time of payment, was to be computed and charged against him; but if any balance on such account should appear to be due to the said Respondent, the same was to be accordingly charged against the Appellant.

Against the order made upon the second, third, fifth, and sixth exceptions, and also the order upon the tenth, eleventh, and twelfth exceptions, and the order whereby it was referred to the Master to take an account of the rents of the purchased lands in the pleadings mentioned, received by the Appellant from the year 1789 to the year 1816, when the Respondent got into possession: and an account on the foot of the principal and interest of the purchase-money in the pleadings mentioned during the same period, and against the direction that in case any balance should appear to be due to Appellants on such account, the same, with interest thereupon down to the time of payment, should be computed and charged against the Respondent, but in case any balance on such account should appear due to Respondent, the same to be accordingly charged against the Appellants, this Appeal was presented.

For the Appellants—

As to the order made upon the 2d, 3d, 5th, and 6th exceptions, the House of Lords, by their decree, had determined the Appellant's right to an inquiry, whether he had any claim against the Respondent as

executor of Roger Hamilton M'Neill, with respect to the purchase money of the Taynish estate by the law of Scotland, notwithstanding the evidence in this cause which was before the House, upon the hearing of the former appeal in this cause; and although it appeared upon the evidence before the Master, that the Appellant had such claims as reported by the Master, yet the Lord Chancellor professed to make the said order upon the evidence in the cause as barring the Appellant's right to any relief, notwithstanding the decree of the House and the finding of the Master.

Even supposing that, notwithstanding the order of the House, the court below was justified in taking into consideration the several matters stated in the said order, there is no ground for supposing that the Appellant had received any part of the purchase money of the Taynish estate, or compromised his rights thereto, the only evidence in the cause being that, after the discharge of the incumbrances affecting the estate, the purchase money had been paid to Roger Hamilton M'Neill, or to his agents, the Master having by his report so found, which is unexcepted to in this respect; and the Respondent having stated in his case, upon the former appeal in this cause, that a sum of 10,000*l.*, or thereabouts, part of 21,000*l.*, for which the Taynish estate was sold, was applied in paying off different incumbrances on the estate, including 2,000*l.*, the portion of the Respondent's wife, as the only younger child of Roger, the father, and Elizabeth his wife; and that the remainder of the 21,000*l.* except about 700*l.*, was received by Dr. M'Neill, on the account of Roger the father; and the Respondent, in his answer to the

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Appellant's original bill in this cause, having relied upon Roger Hamilton M'Neill being seised in fee of the Tavnish estate, and entitled to dispose thereof as he thought proper.

The 2d, 3d, 5th, and 6th exceptions are taken upon the ground, that the Master found by his report the several matters to which the said exceptions are taken, contrary to the evidence laid before him, yet the Lord Chancellor did not profess to make his order upon the evidence laid before the Master.

For the Respondent—

Roger Montgomery Hamilton M'Neill cannot be considered as having had an estate or interest in the Tavnish estate, under the contract, and must be considered as having relinquished all right to the purchase-money (if any such he had), by his having interfered with the Raplock rents, during the life of his father, and demanding a portion of them by his original bill, in this cause, and on account of deliberate acts of election, to abandon all benefit under the contract, and insist upon his rights against his father, and on account of his repeated acknowledgments of the right of Michael Cahill, as executor of his father, to receive the said purchase money, and particularly by the release and disclamation in the Scotch court.

Independently of the circumstances of this case, a court of equity ought not to favour so stale a demand as that made by the Appellant Roger Montgomery Hamilton M'Neill, respecting the purchase-money of the Tavnish estate, particularly as he did not think proper to make such demand in the lifetime of the parties who were privy to the transaction, and at this distance of time, and referring to the circumstance of

Roger the father having paid a large sum of money out of the purchase-money, for and on account of Roger Montgomery Hamilton M'Neill, about the time he ratified the sale, and also the circumstance of Roger Montgomery Hamilton N'Neill receiving the Raplock rents, it must be presumed, that an arrangement was entered into between Roger, the father, and the Appellant Roger Montgomery Hamilton M'Neill, whereby the Appellant Roger Montgomery Hamilton M'Neill gave up all title and claim to the purchase money of the Taynish estate.

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For the Appellants—*Sir C. Wetherell* and *Mr. Shadwell*.

For the Respondents—*Mr. Hart* and *Mr. Lynch*.

The Lord Chancellor.—In this case, upon the former appeal, a very special order was made by the House, in pursuance of which a reference to the Master was made in the court below, on several points which were the subject of the order. The Master having made his Report, sixteen exceptions were taken on the part of the Respondent, many of which were allowed, and the present appeal is against that allowance. The parties are in this situation. One object of the bill filed in the court below was to set aside the sale of the Taynish estate; another object was to obtain an account. As to the estate, the father's interest vested in him under the limitations of a marriage settlement. The Appellant was the only son of that marriage. The estate was sold by the father, and the money received by him. The material question was in the result, whether the purchase money so received should form part of the account to be taken between the Appellant and the Respondent, as

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executor of his father. It was contended in the former stage of the cause, that for this purpose the matter was not sufficiently put in issue, and the court below adopting this view of the case, dismissed the bill. Upon the appeal against this decree, it was in this point reversed, this House being of opinion that the question was sufficiently put in issue by the pleadings to warrant an inquiry whether any part of the debts of the son were paid by the father, and out of the price of the Taynish estate, so as to form a subject of set-off in the account, to the extent of the debts so paid, but not as to any surplus. The order made upon that occasion was framed with great accuracy and minuteness.—(Here the Lord Chancellor read the order, see vol. ii. p. 264, 1st series.) The House drew this distinction, that it was competent to the Appellant to give evidence to rebut the claim made against him by the Respondent as his father's executor, in respect of debts paid for him by his father, but that the matter was not sufficiently in issue to raise any question by evidence as to any thing beyond this pecuniary claim against him.

Upon this order, an inquiry being directed in the court below before the Master, the opinions of Scotch advocates were taken, but the result of the report was, that the purchase money of the estate, upon the death of the father, belonged to the Appellant, and he was to have a credit accordingly. The court below has founded its judgment on the evidence before the House on the former hearing, and as all the evidence referred to in the judgment was before the House at that time, an inquiry would not have been directed as to the law of Scotland, if the House had conceived that the right being established, it would not lead to a sufficient result.

It must then have been supposed, that if it were established, that by the law of Scotland the money belonged to the Appellant, the consequence would follow, not as decided by the court below, but as before contemplated by the House. Moreover, the answer of the Respondent filed in the cause does not insist that he is entitled to the purchase money, as representative of the father, but that the father was entitled to the estate in fee. It must be assumed, in this state of the evidence, that the 10,000*l.* which remained of the purchase money became the property of the son, and that it was not paid over to him. It is not probable it would have been paid, without deducting the counter claims against him. Out of this sum, according to the order in the former appeal, and the subsequent proceedings, he is entitled to have so much allowed on account as may balance the claims against him. So far the exceptions must be overruled, and the order of the court below reversed. In all other respects the decree must be affirmed.

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Die Mercurii, 23d July, 1828.

After hearing counsel on Monday, the 18th, Thursday, the 21st, and Friday, the 22d days of June, 1827, upon the petition and appeal of Roger Montgomery Hamilton M'Neill and Daniel M'Neill, Esqrs. which appeal was by order of this House, of the 11th of this instant June, revived against the Respondents Michael Cahill and Robert Grove Leslie. And also in the name of the Appellant Daniel M'Neill, complaining of an order of the Court of Chancery in Ireland, of the 8th of March, 1825, and praying that the same might be reversed, and the exceptions overruled, and that the report might be confirmed,

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and that such further order might be made as should be agreeable thereto. As also upon the answer of Michael Cahill, and the separate answer of Robert Grove Leslie, put in to the said appeal, and due consideration had this day of what was offered on either side in this cause. It is declared by the Lords Spiritual and Temporal in Parliament assembled, That upon the evidence and circumstances of this case, the Appellant Roger Montgomery Hamilton M'Neill is entitled, out of the money arising by the sale of the Tavnish estate to a credit in this cause, equal to the claim which the Respondent, as executor of Roger Hamilton M'Neill, deceased, has against the Appellant. And with this declaration, It is ordered and adjudged, That the second, third, fifth, and sixth exceptions be over-ruled, and that the said order of the Court of Chancery in Ireland, complained of in the said appeal, so far as regards the said exceptions, be and the same is hereby reversed; and that the said order, in all other respects be, and the same is hereby affirmed. And it is further ordered, That the cause be remitted back to the Court of Chancery in Ireland, to proceed further therein, as shall be just and consistent with this judgment.

W. Courtenay, Dep. Cler. Parliament.

REPORTS OF CASES
 HEARD IN THE
HOUSE OF LORDS,
 UPON APPEALS AND WRITS OF ERROR,
And decided during the Session 1828,
 9th GEO. IV.

IRELAND.

(COURT OF CHANCERY.)

MARY KELLY - - - - - *Appellant.*

JOHN BATEMAN, and MARY his }
 Wife, and JOHN BURKE BATE- } *Respondents.*
 MAN, a Minor - - - }

A bill for an account was filed in 1718. A decree was made in 1720. The account was pending in the Master's office until 1734, when it was referred to arbitration. The award was made in 1738, by which a sum of 5369*l.* 16*s.* 1*d.* was awarded to the Plaintiff, and the award was made a decree of the Court, which was affirmed upon appeal to Parliament in 1739.

In 1741 the Plaintiff, to enforce the payment of the sum awarded and decreed, filed a new bill in the nature of a bill of amendment and revivor, against the representative of the Defendant in the former suit, charging that a certain mortgage held by him was part of the assets, and praying that it might be applied in payment of the demand. The Defendant to the last suit, by his answer, admitted the mortgage. In 1742 the Plaintiff filed an amended bill. In 1747 he filed another amended bill, praying in default of personal estate a foreclosure of the mortgage, and that the principal and

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interest might be applied in satisfaction of his demand, stating, among other things, that he had obtained a sequestration against the lands of G. B., the Defendant in the first suit, who had died before it could be executed, having by his will charged his lands with the payment of his debts. The object of this bill was to obtain payment of the sum awarded from the assets of G. B., part of which assets, as the bill charged, consisted of a mortgage upon an estate called Tyaquin, and that G. B., and his representative, had been in possession under the mortgage, and had received out of the rents and profits sufficient to satisfy the Plaintiff's demand.

In the years 1748, 1751, and 1754, upon the death of parties, bills of revivor and amended bills were filed. From this time no proceedings were taken until the year 1771, when a bill was filed by the representative of the original Plaintiff against the representative of the original Defendant, stating impediments to the prosecution of the suit, and praying an account of the rents received from the lands mortgaged. In 1772 the Defendant filed an answer refusing the discovery, and in 1778, upon exceptions he filed a further answer, still refusing the discovery, which was reported insufficient.

From this time no further proceedings were taken in the cause until the year 1785, when the representative of the Plaintiff in the last suit and of the original Plaintiff filed a bill of revivor and amended bill against the representative of the Defendant in the last suit, and against J. B. the heir of the alleged Mortgagor, stating impediments to the prosecution of the suit from the litigation in which his testatrix had been involved; and that a deed had been made by collusion between the representative of the mortgagee and J. B., the heir of the mortgagor, by which the former conveyed the lands to the latter in consideration of an annuity; charging that the deed was a fraud upon the Plaintiff, and a *devastavit* of the assets, and praying an account of the real and personal estate of the first representative of the original mortgagee, who had charged his debts on his real estate, and devised it and bequeathed his personalty to the Defendants, his representatives.

In 1787 the Defendants, the representatives, by their answer admitted that the deed as charged by the bill was fraudulent, and contended that the Plaintiffs should first have recourse against the lands mortgaged. From 1787 to 1795 no step was taken in the cause. Between the years 1795 and 1804, nine

bills of revivor and amended bills were filed. By a decree in 1808, accounts were directed to be taken of the personal and real assets of the original Defendant and his first representative. In 1810 the Master reported that 28,657*l.* was due to the Plaintiffs; that the assets of the original Defendant consisted partly of a mortgage of the lands of T. which came into the hands of his representative, who had received of the rents and profits sufficient to answer the demand.

Upon exception to this report, the Master by a decree upon further directions was ordered to inquire under what title the representative of the original Defendant entered into the lands of T. Upon which reference the Master reported that he entered as mortgagee. Exceptions being taken to this report, upon the ground (among others) that notwithstanding the existence of apparent securities, and various accounts between the parties on the foot of an apparent mortgage, there was evidence before the Master that the deeds were in reality only deeds of trust to secure the estate against the claims of adverse creditors; and farther, that there were existing judgments, being charges upon the lands prior to the Plaintiff's claim, and that the representative of the original Defendant entered upon the lands not by virtue of the mortgage, but under the limitations of a marriage settlement; by a farther decree upon farther directions, the exceptions on these points were allowed, and the account was directed to be taken excluding the alleged mortgage, and the bill as against J. B. was dismissed. Held on appeal that the decree was right.

Whether delays such as appear to have occurred, and under such circumstances as in the case reported, ought to operate as a bar to a demand in a Court of Equity? *Quære.*

Whether under the circumstances stated in the case, J. B. the heir of the supposed mortgagor, and lessee of the lands in question, was a necessary party to the appeal? *Quære.*

THIS suit arose out of a joint purchase of certain wood lands made in the year 1711.

On the 22nd of November, 1747, Gerald Burke filed his original bill in the Court of Chancery in Ireland, against Sir Walter Blake, stating that in the year 1711, he, in partnership with Gerald

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Burke and Ulick Burke, purchased from the then Earl of Clanricarde certain woods in the County of Galway; and praying as against Sir Walter Blake an account of the profits made of the woods, and payment of any balance which upon taking the account might appear to be due to him. Sir Walter Blake put in his answer claiming a balance to be due to him.

On the 16th of December, 1718, Sir Walter filed a cross bill, charging amongst other things that he had paid down his proportion or third part of the purchase money, and joined Gerald and Ulick Burke in securities for the remaining two third parts thereof which he afterwards paid; and praying that all proper accounts might be taken, and an account of what was due to him by the said Gerald, and that he might be decreed entitled to the benefit of a judgment entered against the said Gerald.

On the 27th of May, 1720, a decree to account was pronounced in both causes, whereby it was referred to one of the Masters of the Court to examine and report whether Sir Walter Blake had paid his part of the purchase of the said woods, and how far he was indemnified on account of his said securities so entered into for the said Gerald, which decree was afterwards affirmed upon re-hearing.

The account before the Master having been protracted until the year 1734, it was upon the argument of certain exceptions taken to the Master's report by both parties, agreed to by both parties to refer the subject matter of the causes to arbitration, and the same were accordingly referred.

In 1738, the arbitrators made their award, and awarded that Sir Walter had paid his share of the purchase money, and had been obliged to pay the remainder thereof under the said securities; and they therefore awarded the sum of 5,369*l.* 16*s.* 1*d.* to be paid by the said Gerald Burke to the said Sir Walter Blake, which award was afterwards made a decree of the said Court.

On the 21st of December, 1738, the Court pronounced an order, confirming the award, and decreeing that pursuant to the submission, award, and order, the sum of 5,369*l.* 16*s.* 1*d.*, being the sum awarded to be justly due and owing by Gerald Burke to Sir Walter Blake, together with interest for the same from the 2nd day of July then last, should within six months from the date of the award, be brought in, and deposited by Gerald Burke with the Usher of the Court, to be paid to Sir Walter Blake, his executors and administrators.

Gerald Burke having appealed from this decree on the 9th of June, 1739, it was affirmed by the House of Lords.

Gerald Burke died after the date of this affirmation.

On the 19th of May, 1741, Sir Walter Blake filed his bill, in the nature of an amended bill, and bill of revivor against Thomas Gerald Burke, the son and heir, and against the executors of Gerald Burke, and against Ulick Burke.

Thomas Gerald Burke filed his answer to the bill on the 18th of December, 1741, and by his answer admitted the existence of the mortgage.

Sir Walter Blake filed an amended bill on the 17th of August, 1742, charging more particularly

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than in his former bills, the several matters afore-said, and praying like relief.

On the 3rd of June, 1747, Sir Walter filed an amended bill, which charged, among other things, that Mary Burke and Alexander Carroll, the executors of Gerald Burke, had died, and that administration with the will annexed of the said Gerald was granted to Thomas Gerald Burke, who was also administrator of the said Mary; and among other things the bill prayed that in default of sufficient personal estates of Gerald to pay the amount of the demands, the same might be charged on the real and freehold estate of the said Gerald, and that the decree might be carried into execution; and also prayed a foreclosure of the mortgage, and that the principal and interest due thereon should be applied in satisfaction of the said demands.

On the 20th of August, 1748, Dame Agnes Blake filed a bill of revivor, which stated that Sir Walter Blake had died, and by his last will had appointed his wife, the said Dame Agnes Blake, his executrix, who obtained probate thereof, and prayed that the suit might be revived.

On the 17th of November, 1748, Catharine Daly, widow, filed an amended bill and bill of revivor, which charged, that Dame Agnes in the year 1748, and immediately after she had filed a bill of revivor, had died, having made her will, whereby she appointed Catharine Daly her sole executrix, and that she had obtained probate of the said will, and praying that the cause might be revived, and such relief as had been prayed for by Sir Walter Blake.

On the 19th of October, 1751, and the 25th of

April, 1754 respectively, Catherine Daly filed further bills of revivor and amendment, which charged the deaths of several of the parties to the suit, and prayed that the cause might stand revived, and such relief as prayed in the original bill of Sir Walter Blake.

On the 27th of April, 1771, Catherine Daly filed an amended bill against Thomas Gerald Burke and several others, charging that in consequence of several abatements and new parties becoming necessary, and of a claim being set up by Sir John Browne, under the pretence that he was the husband of the said Catherine Daly, and which claim she was not able for several years to get rid of, and the delays practised on the part of Thomas Gerald Burke, the cause was greatly retarded; and setting out the particulars of the proceedings so instituted by Sir John Browne, and the various alleged causes of delay which had obstructed the prosecution of the cause: the bill further stated, that in the year 1763 John Burke became entitled to the equity of redemption in the lands subject to the mortgages and securities: that Thomas Gerald Burke, although in his former answer he had denied that he had in his possession the mortgage deeds of the Tyaquin estate and the accounts, yet he had stated those deeds and accounts in a bill filed by him in the Court of Exchequer in the year 1754, against Rickard and Thomas Burke, and had referred to them as being in his possession; and charged that Thomas Gerald Burke had been in possession for many years of the mortgaged premises, and required Thomas Gerald Burke to set out the mortgages, securities, and accounts,

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and the sums he received, or without wilful default might have received, as mortgagee in possession under the securities; and prayed, amongst other things, that an account might be taken of the rents of the mortgaged premises, and by whom received.

On the 28th of May, 1772, Thomas Gerald Burke answered the bill, and refused to give such discovery as to the mortgage deeds and accounts, or as to the sums received by him out of the mortgaged premises; and exceptions having been taken to the answer, were allowed.

On the 7th of July, 1773, Thomas Gerald Burke filed a further answer to the bill, still refusing to give the discovery sought for, which being also excepted to, and reported insufficient, he never filed any further answer in the cause.

On the 2nd of August, 1785, Edmund Kelly filed a bill of revivor and amended bill against John and Mary Bateman and John Burke, charging, amongst other things, that in the year 1773, Thomas Gerald Burke finding that he was pressed for a discovery of the assets of his father, entered into a conspiracy with John Burke, to whom the lands subject to the mortgage descended, to defeat Catherine Daly in the recovery of her demand, by depriving her of the funds applicable to the payment thereof; and with that view, on the 4th of November, 1773, a deed was made between Thomas Gerald Burke and John Burke, by which Thomas Gerald Burke, in consideration of 500*l.* yearly, thereby secured to him, chargeable on the lands for his life, and several other considerations therein mentioned, released the lands to John Burke, discharged from the mort-

gages and incumbrances; and further charging that 30,000*l.* had been received by Thomas Gerald Burke from the mortgaged premises, as mortgagee in possession: the bill then stated the death of Catherine Daly, and that, after various impediments, on the 10th of March, 1779, Edmund Kelly had obtained probate of her will and administration to Sir Walter Blake; that Edmund Kelly had found himself surrounded with suits and difficulties respecting the effects of Catherine Daly, having been involved in several suits at law and in equity concerning the property of his testatrix, which had prevented him from taking any further step in this cause until after the death of Thomas Gerald Burke, who died in the year 1782, having made his last will, by which he devised all his estates real and personal to his daughter, one of the Plaintiffs, (who afterwards intermarried with John Bateman the other Plaintiff) subject to the payment of his debts; and appointed the Respondent, Mary, his executrix, who proved the will, and also took administration to Gerald Burke; and further charged that the deed of the 4th of November, 1773, was executed in fraud of the Plaintiff, and was a *devastavit* of the effects of Gerald Burke; the bill prayed among other things that the estates of Thomas Gerald Burke devised by him might be sold for the Plaintiff's benefit, and applied in part discharge of the Plaintiff's demand, and that the Defendants might set out an account of the real and personal estate of Thomas Gerald Burke, and for payment of the Plaintiff's demand.

The Respondents, by their answer in 1787, admitted the fraud charged as to the deed of 1773,

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and contended that the Plaintiff must first have recourse to the mortgage of the lands of Tyaquin. No further proceedings appear to have been taken until 1795. Between that year and 1804, nine bills of revivor and amended bills were filed. The cause came on to be heard on the 19th of May, 1808, when the Court pronounced a decree, whereby it was ordered and decreed that Edmund Kelly was entitled to the benefit of the decree on award of the 15th of July, 1738, and referred it to one of the Masters of the Court to take an account of the sum due for principal, interest and costs on foot of the decree, and accounts of the personal and real assets of Gerald Burke and Thomas Gerald Burke.

In pursuance of the decree the Master reported (among other things) that a sum of 28,657*l.* 4*s.* 9*d.* was due to Edmund Kelly for principal and interest on the decree of the 15th of July, 1738, and reported that the personal estate of Gerald Burke, which came into the hands of Thomas Gerald Burke, consisted in part of a mortgage charged on the lands of Tyaquin, and that there was due on foot thereof, at the time of the death of Gerald Burke in the year 1740, the sum of 7,834*l.* 4*s.* 9½*d.* being more than sufficient to pay the amount of the debt then due on the demand of the Plaintiff; and that shortly after the death of Gerald Burke in the year 1740, Thomas Gerald Burke, his son and heir at law, and who afterwards became his personal representative, entered into possession of the lands as mortgagee in possession, and received the rents of the said mortgaged premises, save four denominations, from the year 1740 to the year 1763, and of the entire profits from the

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year 1763, until the 4th day of November, 1773, when he by indenture of that date conveyed the said mortgaged premises in trust for the said John Burke, who claimed the equity of redemption and inheritance thereof; and further reported that during the time aforesaid the said Thomas Gerald Burke applied the rents and profits of said mortgaged premises to his own use, being more than sufficient to pay the demand of the said Edmund Kelly.

On the 20th of November, 1810, the Respondents Bateman and wife filed two exceptions to the report, by one of which they excepted to that part of the report which stated that the mortgaged debt charged on the lands of Tyaquin, came into the hands of Thomas Gerald Burke, as part of the personal estate of Gerald Burke; and by the other exception the Respondents excepted to the amount of the interest calculated upon Edmund Kelly's demand.

On the 29th of January, 1811, the cause came on to be heard upon the report, exceptions and merits, when it was ordered that the matter should go back to the Master to enquire and report whether Thomas Gerald Burke at any time, and when, and under what title, entered into the possession of any and what part or parts of the Tyaquin estate, or received the rents and profits thereof for any and what period, and how he applied the same.

On the 12th of December, 1812, the Master made his further report, by which he found that Thomas Gerald Burke entered into certain parts of the Tyaquin estate, under a mortgage made in 1711 to Gerald his father, and as his representa-

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tive; that he received of the rents and profits from 1740 to 1763, 500*l.* a year, and from 1763 to 1773, 1000*l.* a year.

On the 11th of February, 1811, the Respondents filed fifteen exceptions to the report. The principal question which arose upon these exceptions was whether Thomas Gerald Burke was in possession of the Tyaquin estate as representative of his father as mortgagee, or as the Respondents contended as a purchaser under the marriage settlement of his father and mother, the deeds of supposed mortgage being in fact deeds of trust, executed to secure the lands of Tyaquin, from the claims of adverse creditors.

The exceptions also alleged that there were on record unsatisfied judgments against Gerald Burke, at the time of his death, to the amount of 25,000*l.* all prior to the demand of the Appellants. The most material of these exceptions were allowed.

The evidence was principally as follows:—

A deed, bearing date the 4th of October, 1741, entered into between Ulick Burke and Peter Daly, whereby it was referred to Peter Daly to ascertain what was due on foot of the demands due to Gerald Burke or his representatives; an attested copy of an ejectment on the title brought by Rickard Burke and Thomas Rickard Burke his son, as of Easter Term, 1754, for recovery of that part of the Tyaquin estate, in the possession of Thomas Gerald Burke; a bill filed by Thomas Gerald Burke, in the Court of Exchequer in Ireland, on the 10th of August, 1754, stating the several mortgages, securities, and accounts, and charging that there was then due on foot thereof

a large sum; and praying an injunction against the ejectment, and that he might be decreed to the possession of the remainder of the Tyaquin estate; Rickard Burke and Thomas Rickard Burke's answers to the bill, admitting the possession of Thomas Gerald Burke since the year 1740, under the several securities; an order, bearing date the 8th of July, 1756, whereby the Court of Exchequer granted an injunction until the hearing of the cause, on the equity confessed in the Defendant's answer; an attested copy of a bill filed by Thomas Gerald Burke, in the Court of Chancery in Ireland, on the 24th of August, 1773, against John Burke, the son of Thomas Rickard Burke, stating the deed of mortgage of 1711 from Thomas and Ulick Burke to Gerald Burke, and the deed of 1741, to Peter Daly, and that Gerald Burke, under the mortgage of 1711, was in the possession of the greater part of the lands for several years; and that upon his death, Thomas Gerald Burke, under the mortgages and securities, entered into possession of that part of the lands of which his father had been in possession; that on the 20th of January, 1763, Thomas Gerald Burke entered into possession of all the lands mentioned in the deed of 1741, (except Carrownamoneen), that is, the whole of the Tyaquin estate, under the mortgages and securities, and that he continued in the quiet and peaceable possession of the lands, under and by virtue of same, until the 9th of March, 1773, when John Burke took forcible and illegal possession of part of the premises; and praying an injunction to restore him to the possession thereof; depositions of Peter Haverty, John Allen, and

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Rickard Burke, who proved that from the year 1740 to the year 1763 Thomas Gerald Burke continued in possession of part of the Tyaquin estate, under the mortgages, and received thereout 500%. a year during that period; and that from the year 1763 Thomas Gerald Burke continued in possession of the whole estate, and during that period received thereout 1,000%. a year; depositions of Cesear Trench, William Kelly, and Ulick Burke O'Brien, proving that from the year 1763 to the year 1773 Thomas Gerald Burke was in possession of the whole of the Tyaquin estate, producing 1,000%. a year; evidence that Thomas Gerald Burke protected his possession of the lands, under and by virtue of the mortgages, against various proceedings and *elegits* which were adopted against the lands; a settlement, dated 1700, executed on the marriage of Rickard Burke, (by Thomas Burke therein described as tenant for life), the second son of Thomas Burke the settler, by which Thomas Burke conveyed several lands, and among others the lands of Tyaquin, to the use of himself for life, remainder as to a part of the lands to Margery his wife for life, as a jointure, remainder as to the other lands of Tyaquin, being the mortgaged lands and the lands of Tample, to the use of Ulick Burke for life, with remainder to his first and every other son, remainder to Rickard Burke for life with remainders over; but in the deed there is contained a power of revocation, by which the settler was at liberty to revoke all the limitations therein mentioned, except the lands limited in jointure to Margery; a deed bearing date the 10th of December, 1709, and executed

by the settler, whereby he revoked the several uses, estates, and limitations aforesaid.

There was also evidence, that after the execution of the deed of 1700, the heir of Rickard Burke altered the words in the power of revocation: "excepting the lands limited in jointure to Margery" were erased, and the words "excepting the uses limited to Rickard and the heirs male of his body" substituted, and the erasures appearing upon the face of the deed were admitted by the answers of Thomas Gerald Burke, and of the Respondents in the said cause, which were given in evidence, in which the Respondents swear that the heir of Rickard Burke having, under the deed of 1700, brought an ejectment for the recovery of the Tample estate, the Respondents took defence thereto, and the cause was tried at Galway in the year 1802, and the Respondents protected themselves by proving the deed of revocation, and that the deed of 1700 was altered, and thereupon Respondents obtained a verdict; settled accounts of the 19th of October, 1733, purporting that Gerald Burke was as mortgagee in possession of part of the premises; sequestration grounded on the decree obtained by Sir Walter Blake against Gerald Burke, under which the tenants of the lands were served with orders to pay their rents to the sequestrators; a memorial of a lease dated the 1st of May, 1745, whereby Thomas Gerald Burke demised to Jeoffry Davis the lands of Carintarman, part of the Tyaquin estate, for thirty-one years, at 40% per year.

The cause was heard on report, exceptions, and merits, on the 25th of May, 1813, when it was referred back to the Master to take an account of

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the personal estate of Gerald Burke, into whose hands the same came, and how applied, except such part thereof as was alleged to consist of the mortgage or charge on the Tyaquin estate, also on account of the debts of Gerald Burke, and the priorities thereof, and whether any and which thereof was paid, and when, and out of what fund; and as to the Defendant John Burke, the bill was dismissed without costs, and the Master was to rectify his report pursuant to the rules so made on the exceptions, and all further directions were reserved until the return of the further report, which last mentioned decree was on the 29th of June, 1815, when the cause came on to be re-heard upon a petition presented by the Plaintiff by the same Court affirmed.

John Burke Bateman having died, the cause had been revived against the Respondent Thomas Burke Bateman, the eldest son of the Respondents John and Mary Bateman.

It was contended on behalf of the Appellants, that the original decree, the rules made on the exceptions to the original and further report, and the decrees made on further hearing and re-hearing, were erroneous, and not warranted by the pleadings and evidence, and ought to be reversed.

For the Appellants:—

As to the rules made on the exceptions and original report, there were sufficient grounds, without any further enquiry as to the receipt of the rents of the mortgaged premises by Thomas Gerald Burke, to have charged him with the mortgage debts, as assets which he might have received, or upon the ground of his having

released the mortgaged premises by the deed of 1773, which deed, though fraudulently contrived by its recitals to colour and conceal the truth, was in this respect contradicted by the other evidence in the cause, and was executed at the time when Catherine Daly claimed those securities as the assets of Gerald Burke, applicable to the payment of the demands, and while Thomas Gerald refused to give the discovery touching the assets required by the bill, and it is admitted by the defendants in their answer, to have been a fraudulent deed, the result of which was to give Thomas Gerald an annuity of 500*l.* per annum for his life, to release all accounts of what he theretofore received out of the mortgaged premises, and to extinguish the mortgagee, to the prejudice of Gerald's creditors.

As to the rules made on the seven exceptions to the last report, and the decree founded thereon, it appeared by the several deeds, securities, mortgages and accounts between Thomas and Ulick Burke, and Gerald Burke, that Gerald Burke was himself, as mortgagee, in his life time in possession of part of the Tyaquin estate, inasmuch as in the accounts he gives credit for certain rents thereof; although it is alleged in the defendant's exceptions to the report, that Gerald Burke did not enter into possession of the estates as mortgagee, no satisfactory evidence has been produced by the defendants to shew in what other right, or by what other title he entered into possession.

Although the defendants in their exceptions to the report relied upon the fact that Thomas Gerald Burke did not hold the possession of the premises

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as mortgagee, contrary to the admission of Thomas Gerald Burke himself, made by the several proceedings, and by which admissions, as his representatives, the Defendants are concluded—yet even admitting the Defendants not to be so concluded, they have given no satisfactory evidence in answer to the admissions, and the several documents so produced and proved in the cause.

The Defendants, in their exceptions supposed that such possession was not referable to the title of Thomas Gerald Burke as mortgagee, or under the securities, but they gave no satisfactory evidence in support of their exceptions.

The Respondents in the Master's office, impeached for fraud and want of consideration, the several securities and accounts under which Thomas Gerald Burke entered into possession of the Tyaquin estate, and for that purpose referred to a bill filed by Ulick Burke the mortgagor, against Gerald Burke, impeaching these securities, but it was not proved that he obtained any relief upon the bill, nor was any evidence given to impeach the securities.

It was further made clearly to appear that Ulick Burke could not have been tenant for life, inasmuch as Ulick died in the year 1750, and from thence until the year 1773, a period of twenty-three years, it appeared in evidence in the cause, that Thomas Gerald Burke protected his possession against Rickard and Thomas Rickard Burke under the mortgages against the most adverse proceedings, all of which were proved in the cause and before the Master.

The Respondent by the exceptions relied upon the fact that the possession of Thomas Gerald

Burke was not as mortgagee of the Tyaquin estate, yet the Plaintiff gave the most decisive evidence to shew that Thomas Gerald Burke was in possession of the lands as mortgagee for his own benefit.

It was contended by the exceptions, that Thomas Gerald Burke had not received from the lands so much as the Master had by his report stated him to have received, yet no satisfactory evidence was given by the Respondents to shew what he did receive from the lands, and there was given by the Plaintiff the most satisfactory evidence that could be expected after a period so remote, to shew the amount of the rents received by Thomas Gerald Burke; but supposing that such evidence was defective, Thomas Gerald Burke, in his first and second answers to the bills of 1771, filed by Catherine Daly, having refused to set out an account of the rents received by him out of the mortgaged premises, and while he thus refused to render such account, having executed the deed of the 4th of November, 1773, thereby releasing to the heir of Rickard the mortgaged premises in consideration of 500*l.* a year, granted to Thomas Gerald Burke for life, and which he executed pending the bill of 1771, must be considered as having admitted that he had received the entire amount of such mortgaged sum, and was liable in his life time, and that the Respondents, as his personal representatives and devisees, are now liable, as if the whole of the mortgage debt had come to the hands of Thomas Gerald Burke.

The Defendants before the Master relied particularly upon the recitals in the deed of 1773, as

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shewing that Thomas Gerald Burke was in possession of the lands, under the unregistered settlement of the 4th of July, 1711, alleged to have been executed on the marriage of Gerald Burke with Mary Davis, and that by the settlement it was covenanted, that the fortune of Mary Davis, amounting to 2,000*l.* should be laid out in the names of trustees therein mentioned in the purchase of land or on securities; and they alleged that part or all of the fortune of Mary Davis was, pursuant to the covenant, laid out in the mortgages of the Tyaquin estate, but no evidence of that fact was given by the Respondents, and it appeared from the settled accounts and evidence given in the cause that no greater sum than 483*l.* of the fortune of Mary Davis was laid out upon any securities charged upon any part of the Tyaquin estates, which consisted of sixteen denominations, and that the same was only chargeable upon three denominations thereof, namely, Tyaxon, Knockbrac, and Knockaniskirtane; and it also appeared that the mortgages and securities were taken in the name of Gerald Burke, and not in the name of the trustees of the settlement, and from the nature of the accounts and the dealings between the parties, it appears that the sums were advanced by Gerald Burke himself, to and for the use of Thomas and Ulick Burke, and not by the trustees of such settlement; and by the Master's first report it was reported, and not excepted to, that a sum of 7,834*l.* remained due upon the foot of the mortgages and securities at the time of the death of Gerald Burke, so that even if the whole of the fortune of Mary Davis (of which Gerald was entitled to a use for life) was lent out upon

the securities, still there was exclusive thereof a sum remaining due thereon, sufficient to pay the then Plaintiff's demand, besides that in the answer of Thomas Gerald Burke, it is sworn by him that a part of the fortune was laid out in the purchase of lands, and it appears in addition that the marriage settlement never was registered, and so could not affect the claims of the Plaintiff under the mortgages and securities, and also that the marriage settlement was fraudulent, because although it appeared in evidence that at the date of the settlement, Gerald was considerably in debt, yet the articles covenanted that all his future acquisitions should be applied to the uses of the settlement.

The Respondents relied upon a supposition that Thomas Gerald Burke was in possession of the Tyaquin estate, as guardian of John Burke, the son of Thomas Rickard Burke, yet no evidence was given of such fact of guardianship, on the contrary such fact was clearly disproved by evidence of various hostile proceedings which had been carried on between Thomas Gerald Burke and the Tyaquin family, and at all events as Thomas Gerald Burke was administrator of his father, whose creditor had a bill depending to make the mortgage assets, it would have been his duty to have retained the amount of the debts out of the rents, as an incumbrance payable thereout.

The Respondents in their answers in the cause, have not relied upon the matter by which they endeavoured to sustain their exceptions, but on the contrary, by their answers to Edmond Kelly's bill, they have insisted that the mortgages and

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securities were the funds applicable to the payment of Edmond Kelly's demand.

For the Respondents—

The Appellant, and those through whom she claims, have neither taken those steps which they ought to have done to enter up satisfaction of certain judgments, mentioned in the award of 1738, nor have they brought those parties before the Court whom they were bound to bring before it, before they can have that benefit of the award of 1738, which is now claimed. The case now attempted to be established by the Appellant and her late husband, Edmond Kelly, is essentially different from that which was made and argued on behalf of the Appellant, and those through whom she claims, when it was first heard and determined by the Court below. Sufficient legal evidence has not been produced, that any part of the personal estate of Gerald Burke, or any part of the personal estate of Thomas Gerald Burke, except what has been admitted by the Respondent Mary Bateman, ever came into the possession of any of the Respondents; or to shew at this distance of time when, or how long, or of what parts of the Tyaquin estate, Gerald Burke or his son Thomas Gerald Burke was possessed, or what was the amount of the rents and profits thereof, then received by either of them; or whether any part thereof was applied by either of them, in discharge of the securities mentioned in the Master's last report, or to their own use; or that any of such rents and profits have come to the hands of any of the Respondents.

All the evidence, oral as well as documentary, which has been produced, goes to prove, that all the rents and profits of the Tyaquin estate which Gerald Burke or his son Thomas Gerald Burke received, were received by them not as mortgagees, but as purchasers under the marriage settlements of Gerald and Mary Burke, and that such rents and profits are not answerable for any part of the Appellant's claim.

The endless delays which have taken place in the prosecution of the suit, by rendering it impossible for the Respondents, from lapse of time, and from the multitude and intricacy of the transactions which have occurred between all the parties connected with the cause, to produce the witnesses, books, papers and accounts, and particularly the account of the sales of wood during the years 1718, 1719, and 1720, which would have enabled them at an earlier period to destroy or reduce the balance which the award of 1738 finds due by Gerald Burke, amount to a degree of laches, which, when taken in conjunction with the Appellant's and Edmond Kelly's acquiescence, from 25th May, 1815, to the 10th of February, 1824, in the Chancellor's decree on the present exceptions and merits of the cause, do in equity and good conscience constitute a valid bar to the present claim.

The Respondents also raised an objection for want of parties, because the bill had been dismissed as against John Burke, who held the estate claimed by the Appellants as part of the assets of Gerald Burke; and it being an appeal against the whole decree, it might in some events

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become necessary to resort to his estate, that is of a party not present in the appeal, and to direct a sale in his absence.

On this point the counsel for the Appellant contended, that the appeal in substance was confined to the matter of the exceptions; that the present object was mere matter of account against the representative of a party who had received the rents as mortgagee: and as to the consequent liability of any other party in a given event, it was matter of subsequent proceeding: that where the question in a cause relates to a debt received by an executor, it is not necessary that the debtor should be a party: that for the purposes of the present appeal, they would waive the relief against the heir of the mortgagor; that the representative of the mortgagee could not be affected by the presence or absence of the heir, in the question of taking the account; that it was contrary to the course of equity to adjudicate equities between co-defendants; that upon a question of *devastavit*, it was sufficient to bring before the Court the party charged with the delinquency, and it could not be necessary to bring other parties, as for instance, a debtor to whom the personal representative had released a debt.

Upon this question, in the course of the discussion, the Lord Chancellor made the following observations:—

According to the pleadings, the appeal is in fact against the original as well as the subsequent decrees: the Appellants, in case of a deficiency of assets, ask for a sale of the estate now held

by John Burke. I do not at present understand upon what ground the bill was dismissed against him. Suppose there should not be assets otherwise, then the mortgaged property may be liable. The Appellants must have made John Burke a party, because they contended that he was not entitled to hold the property under the conveyance to his ancestors by Thomas Gerald Burke. The bill was dismissed as against John Burke. How then can the Appellants have a right to appeal against a decree which includes such a dismissal without calling John Burke before the House, as a party to the appeal? In this view, suppose the appeal was not against the whole, but only a part of the decree, would not John Burke be equally a necessary party? The Appellants certainly in their pleadings in the Court below prayed relief against John Burke. If they consent to abandon that part of the relief, and to confine the appeal to the question of the account against the executor, the case might perhaps proceed, as if the bill had originally prayed only relief against the executor


On the 28th of July, the Lord Chancellor affirmed the judgment, observing only, that he had looked attentively through the papers, and saw no reason to disturb the judgment.

Judgment affirmed.

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(COURT OF CHANCERY.)

DAVID RUTLEDGE, and WILLIAM } *Appellants.*
 RUTLEDGE, an Infant - - - }

ROBERT RUTLEDGE - - - - - *Respondent.*

P. being possessed of lands for a term of lives, with a covenant for perpetual renewal, by articles made upon the marriage of his son in the year 1743, covenanted to convey his estate and interest in the lands to W. and other trustees, to the use of himself for life, remainder to the use of his son T. for life, remainder, subject to a jointure, to the sons of the marriage successively in tail male, reversion to P. the settler.

In 1749 the reversion of the lands subject to the lease, was granted to W. as trustee for P. to whom it was soon afterwards granted over by W.

P. by his will, dated in 1766, devised all his real estate, including his leases for lives, in trust for T. his son, for life, remainder to P. (son of T.) his grandson for life, remainder to the sons of P. the grandson successively in tail male, with divers remainders over, reversion to the heirs of P. the deviser. The testator by his will declared, that " If his grandson P. should not settle such interest in that part of the lands which was settled on his father's intermarriage, and which he would become entitled to on the testator's and his father's decease, to the uses to which the testator's estates were thereby limited upon the desire of his father, his son T. at his will and pleasure, and in his discretion, might and was by the will empowered to deprive P. the grandson of the life estate in the lands thereby limited to him, so as such deprivation should not alter the limitations in remainder;" and in a subsequent clause he having provided, " that in case his grandson P. happened to die without issue male, and should settle the interest which was settled on his father's marriage in part of the real estates of the testator, and to the same uses as limited by the will, so that his acquisitions should go together," he gave to P. a power to charge the

lands devised with portions for daughters, and in a subsequent part of the will he gave a power to P. to charge a jointure upon the real estate of inheritance thereby limited to him, provided he settles his said interest in part of the real estate to the uses therein mentioned.

P. the testator died in 1769. T. his son entered upon the lands under the limitations of the will, and remained in possession during his life. In 1776, T. and P. the grandson upon the occasion, and in consideration of his marriage and a portion, conveyed the term for lives with the right of covenant for perpetual renewal, in trust to secure a jointure to the wife, and subject thereto for the use of T. for life, remainder to P. for life, remainder to secure another jointure, and subject thereto to the sons of the marriage, and in default of issue male, to the trustees for a term to raise portions for daughters, and subject thereto for T. in fee.

Upon a bill filed by a party claiming under this settlement against parties claiming the reversion, to compel a specific performance of the covenant for renewal, held, that according to the limitations, and upon the events above stated, the term of the lands was not merged in the fee; that no case of election arose upon the will of Peter Rutledge, binding those who took under that will to leave the term in question to go according to the limitations of the will.

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THE Right Honourable *Henry Bingham*, and *John Bingham* his eldest son, by indentures of lease and re-lease, bearing date the 2d and 3d of April, 1736, released and demised to *Peter Rutledge*, and his heirs, towns and lands in the county of Mayo, with the appurtenances, to hold to the said *Peter Rutledge*, his heirs and assigns, for the lives of the said *Peter Rutledge*, and of *Thomas* and *William Rutledge*, his sons, at and under the yearly rent of 160*l.* with a covenant for the perpetual renewal of the said term of lives, on payment of the sum of 1*l.* 3*s.* as a fine upon the fall of each life.

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By articles of agreement, executed previous to and in consideration of the marriage of the said *Thomas Rutledge*, the son of the said *Peter Rutledge*, with *Mary Reddington*, bearing date the 10th of November, 1743, and made between the said *Peter Rutledge* and *Thomas Rutledge*, of the first part; *Thomas Reddington* and the said *Mary Reddington*, of the second part; and *William Rutledge* and *Nicholas Reddington*, of the third part; the said *Peter Rutledge*, among other things, covenanted thereafter to convey his interest in the said lands, subject to the said rent and renewal fines, unto the said *William Rutledge* and *Nicholas Reddington*, and their heirs, to the use of himself the said *Peter Rutledge*, for life, with remainder to the said *Thomas Rutledge*, for life; and from and after his death, to secure a certain annual sum, by way of jointure, for the said *Mary Reddington*, and subject thereto, to the use of the first and other sons of the said *Thomas Rutledge* and *Mary Reddington*, in tail male; and in failure of such issue male, to the use of the said *Peter Rutledge*, his heirs and assigns.

No conveyance was executed in pursuance of the articles.

Henry Bingham died about the year 1747, leaving *John Bingham*, his eldest son and heir at law, who thereupon became alone seised in fee of the said lands, subject to the lease.

By a private Act of the Parliament of Ireland, passed in the year 1747, all the estate and interest of *John Bingham*, and the fee and inheritance of the lands subject to the lease, together with other lands, were vested in certain persons

therein named, in trust for sale; and the Trustees, in exercise of the powers thereby in them vested, by indenture of lease and release, bearing date respectively the 12th and 13th of May, 1749, in consideration of the sum of 6,644*l.* 10*s.* conveyed and released all the lands comprised in the indenture of the 3d of April, 1736, and also several other denominations of land, situate in the counties of Mayo and Galway, to William Rutledge, of the city of Dublin, merchant, to hold to him his heirs and assigns.

The conveyance made to William Rutledge was in trust for Peter Rutledge, and the consideration money was the money of Peter Rutledge; and accordingly William Rutledge, by indentures bearing date respectively the 19th and 20th of June, 1749, and by a fine afterwards levied in Easter term 1751, released and conveyed all the lands, and the fee and inheritance thereof, unto and to the use of Peter Rutledge, his heirs and assigns.

Peter Rutledge, by his will, bearing date the 3d of December, 1766, bequeathed to his only son the said Thomas Rutledge, all his leases for lives and years, and all other his personal estate, subject to certain pecuniary legacies; and he gave and devised all his real estate of inheritance in the counties of Mayo and Galway, to Thomas Lindsey and Francis Lambert, and the survivor of them, and the heirs of such survivor, upon the trusts following (that is to say;) to the use of Thomas Rutledge for life, and from and after his decease, as to the estates of inheritance in the county of Mayo, to the use of Peter Rutledge the younger (the only son of the said Thomas

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Rutledge, by Mary his wife) for life, with remainder to his first and other sons in tail male; with remainder to the testator's grandson Richard Rutledge for life; with remainder to his first and other sons in tail male; with remainder to the testator's nephew, William Rutledge, for life; with remainder to his first and other sons in tail male; with remainder to the said testator's nephew the Appellant, David Rutledge for life; with remainder to his first and other sons in tail male; with the reversion to the right heirs of the said testator for ever; and as to the said estates of inheritance in the county of Galway, from and after the decease of the said Thomas Rutledge, the said testator devised the same to the use of Richard Rutledge for life, remainder to his first and other sons in tail male, with remainder to the said Peter Rutledge the younger, for life; remainder to his first and other sons in tail male, with like limitations over, as were before declared respecting the said estates of inheritance in the county of Mayo. The will contained the following declaration: "I
 " also devise, and my will is, that if my grandson,
 " Peter Rutledge, should happen to marry in the
 " lifetime of his said father, the said Thomas
 " Rutledge, without the consent of the said
 " Thomas Rutledge, or that my said grandson
 " should not settle such interest in part of said
 " lands which was settled on his father's inter-
 " marriage, and which my said grandson will be-
 " come entitled to after his said father's and my
 " decease, to the uses which my said estates are
 " hereby limited upon the desire of his said
 " father; in either of such cases, my said son,
 " Thomas Rutledge, at his will and pleasure, and

" in his discretion, may and is by this my will,
 " empowered to deprive him of the use for life
 " thereby limited to him of my estates, so as
 " such deprivation shall not otherwise alter the
 " other uses hereby limited of my said estate of
 " inheritance, to my said grandson Richard Rut-
 " ledge, and my said nephews William and David
 " Rutledge, and their respective heirs male; and
 " I further will and devise, that if my said nephew,
 " William Rutledge, shall not limit his estate of
 " inheritance, in case of failure of issue male in
 " himself, to my said son and grandson, and their
 " issue male, so as his estate, under proper
 " charges, shall, upon his decease without issue
 " male, come to be enjoyed by my said son and
 " grandsons, and their issue male, and their respec-
 " tive heirs in strict settlement, then and in such
 " case the limitation herein to him, and his heirs
 " male to cease, and be null and void, any thing in
 " this my will to the contrary notwithstanding;
 " I also devise, and my will is, that if my said
 " grandson, Peter Rutledge, should happen to
 " die, leaving no issue male of his body, lawfully
 " begotten, living at the time of his decease, or
 " who shall attain the age of twenty-one years,
 " so as my real estate of inheritance in the county
 " of Mayo, should come to be enjoyed by the
 " said Richard Rutledge, my grandson, that my
 " said real estate of inheritance in the county of
 " Mayo, shall stand charged with and subject to
 " the payment of 1,000*l.* to be for my third
 " grand-daughter, Frances Rutledge, and the sum
 " of 1,000*l.* to and for my fourth grand-daughter
 " Mary Rutledge, daughter of my said son Thomas
 " Rutledge, as and for their portions; but in case

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“ my said third and fourth grand-daughters, or
“ either of them, marry in my lifetime, my
“ will is, that my said legacy, as to such of them
“ as should so marry, shall cease; and in case
“ my said grandson, Peter Rutledge, should hap-
“ pen to die without issue male as aforesaid, and
“ that he should settle the interest aforesaid in
“ part of my said real estate of inheritance, which
“ was settled as aforesaid on his father’s inter-
“ marriage, to the same uses of this my will, so
“ as my acquisitions should go together, and my
“ said grandson should leave one or more daughter
“ or daughters lawfully begotten, who shall arrive
“ at the age of twenty-one years, or be married,
“ then I give my said grandson, Peter Rutledge
“ a power of charging my said real estate in the
“ county of Mayo with the sum of 3,000*l.* to-
“ wards the portion or portions, or preferment of
“ such daughter or daughters; and in case my
“ said grandson, Richard Rutledge, should hap-
“ pen to die without issue male, so as my real
“ estate of inheritance aforesaid, under the limi-
“ tations of my will, should come to be enjoyed
“ by the said William Rutledge or David Rut-
“ ledge, or their or either of their issue, then I
“ devise and bequeath, and my will is, that my
“ said real estate of inheritance shall stand charged
“ with the sum of 5,000*l.* payable and to be
“ paid on that contingency to and amongst my
“ grand-daughters Elizabeth Ormsby, otherwise
“ Rutledge, eldest daughter of my said son Thomas
“ Rutledge, and his third and fourth daughters
“ Frances and Mary, and to my grand-daughters
“ Jane and Elizabeth Rutledge, daughters of my
“ said son William Rutledge, deceased, share

"and share alike, that is to say, 1,000*l.* a piece
 "to each of my said grand-daughters, upon the
 "contingency aforesaid; I further devise and
 "bequeath, that my said real estate of inheritance in the county of Galway shall, immediately upon or after the decease of my said eldest son Thomas Rutledge, stand charged and be subject to the payment of 400*l.* sterling, to and for my said grand-daughter Jane Rutledge, and the sum of 200*l.* to and for my said grand-daughter Elizabeth Rutledge, towards their portions and preferment in marriage; and I do hereby authorize and empower my said son Thomas Rutledge, and his son, and my said grandson Peter Rutledge, after the death of my son Thomas Rutledge, provided he settles his said interest in part of the said real estate to the uses herein mentioned, to settle a jointure, chargeable and payable out of my said real estate of inheritance, limited to him as aforesaid, or to charge the said real estate of inheritance so limited to him, with any annuity or yearly sum not exceeding the yearly sum of 300*l.* as a provision for any wife he the said Peter shall or may marry."

The testator, by his said will, empowered his grandson, Richard Rutledge, to settle such jointure as therein mentioned; and also empowered such persons as should respectively become seised of the real estates of inheritance under the will, to make such leases of the estates of inheritance as in the will mentioned; and also gave to Thomas Rutledge a power, "by any deed or writing, to be by him executed and attested by two or more credible witnesses, to charge or

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“ encumber his said real estate of inheritance, in
 “ the county of Mayo, with any sum or sums of
 “ money not exceeding in the whole the sum of
 “ 5,000*l.* to go to such use and uses, and such pur-
 “ poses as the said Thomas shall think proper and
 “ fit to charge the same for; and he thereby fur-
 “ ther authorized and empowered his son Thomas
 “ Rutledge, by any deed or writing, to be by him
 “ executed and attested by two or more credible
 “ witnesses, to charge or encumber his said real
 “ estate of inheritance, in the county of Mayo,
 “ with any sum of money not exceeding the sum
 “ of 3,000*l.*, with lawful interest for the same,
 “ to be vested in the purchase of lands or per-
 “ manent interests, which he is to leave or settle
 “ on his son Peter, and his heirs, in strict settle-
 “ ment, provided he marries with his said father’s
 “ consent, as before, or otherwise such purchase
 “ to go to the other uses herein limited, if said
 “ Thomas should not think fit to limit the same
 “ to his said son.” And the testator, by his will,
 appointed his said son his sole executor.

The testator died in the year 1769. Thomas Rutledge proved the will, possessed himself of the personal property, and entered into and became seised of the several lands and estates limited to his use, and continued in the possession thereof, under the limitations in the will, until the time of his death.

By indentures of lease and release, bearing date the 7th and 8th of August, 1776, and made upon the marriage of Peter Rutledge with Catherine Bloomfield, between Thomas Rutledge and Peter Rutledge the younger, of the first part; John Bloomfield and Catherine Bloomfield his daugh-

ter, of the second part; Sir Charles Bingham and Robert Lord Viscount Jocelyn, of the third part; and Robert Waller and William Rutledge, of the fourth part; after reciting the indenture of the 3d of April, 1736, Thomas Rutledge and Peter Rutledge, in consideration of the marriage, and of the marriage portion of Catherine Bloomfield, conveyed to Sir Charles Bingham and Lord Viscount Jocelyn, the several lands comprised in the recited lease of 1736, to hold to them during the lives of the *cestui que vies*, in the recited indenture named, and of such other *cestui que vies* as should thereafter be added, by virtue of the covenant for perpetual renewal therein contained, in trust for securing an annuity of 100*l.* sterling to Catherine Bloomfield, during the joint lives of her and Peter Rutledge, her intended husband, and subject thereto, to the use of Thomas Rutledge for life, remainder to the use of Peter Rutledge, for life; and from and after his decease, to the use of Sir Charles Bingham and Robert Lord Viscount Jocelyn, in trust, for securing the sum of 400*l.* a year, by way of jointure, to Catherine Bloomfield, and subject thereto, to the use of the first son of Peter Rutledge, by Catherine Bloomfield, until such first son should attain his age of twenty-one years; and then upon trust, that Sir Charles Bingham and Robert Lord Viscount Jocelyn should convey the said lands and premises to such of the sons of Peter Rutledge, by Catherine Bloomfield, as should first attain his age of twenty-one years, his heirs and assigns; and in default of issue male of Peter Rutledge, by Catherine Bloomfield, or in case there should be one or more such sons,

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or they should all die without issue male, under the age of twenty-one years, then to the use of Robert Waller and William Rutledge, their executors, administrators and assigns, for a term of five hundred years, in trust, for securing the sum of 5,000*l.*, for the portions of the daughters of the intended marriage; and subject thereto in trust, that Sir Charles Bingham and Robert Lord Viscount Jocelyn should convey the said lands and premises to the said Thomas Rutledge, his heirs and assigns.

The marriage took place with the consent of Thomas Rutledge.

In the year 1787, a marriage took place between the Respondent, the natural son of Thomas Rutledge, and Elizabeth Knox, and upon that occasion Thomas Rutledge, by indenture, dated the 28th of August, 1787, conveyed several leasehold and other interests in lands, and also the ultimate reversion, or *quasi* reversion, in the lands comprised in the lease of 1736, to Henry King and William Knox, trustees in the said indenture named, to the use of Thomas Rutledge for life, with remainder to the Respondent for life; remainder to the said trustees, for securing a jointure to the said Elizabeth Knox; and subject thereto, to the use of the first and other sons of the Respondent in tail male; remainder to the use of Thomas Rutledge, his heirs and assigns.

In the year 1799, Peter Rutledge the younger died without issue.

By indentures of lease and release, bearing date the 12th and 13th May 1799, made between Thomas Rutledge, of the one part, and the Respondent, of the other part; after reciting the original lease

of the 3d of April, 1736, and that William Rutledge and Peter Rutledge, two of the *cestui que vies* in the said indenture named, were dead; and also reciting, that the interest under the said last-mentioned indenture was then vested in the Respondent, and that the Respondent had paid all rent and renewal fines under the said lease to the said Thomas Rutledge, and had required a renewal thereof, the said Thomas Rutledge demised and released all the said lands comprised in the said indenture of 1736, unto the Respondent and his heirs, for the lives of Thomas Rutledge, Francis Lambert, and the Respondent, and the survivors and survivor of them, at and under the yearly rent aforesaid, with a covenant for the perpetual renewal of the term of lives granted to the Respondent, on payment of the renewal fine of 1*l.* 3*s.* therein recited.

Thomas Rutledge at the same time executed a deed to the Respondent, dated the 10th of June, 1799, whereby he released to the Respondent, his heirs and assigns, the reversion in the lands comprised in the lease of 1736, expectant on the death of the Respondent without issue male.

By deed bearing date the 13th of May, 1799, Thomas Rutledge charged the several lands and estates whereof the testator, Peter Rutledge the elder, was seised as aforesaid, in the county of Mayo, with the sum of 5,000*l.* under the power to him given by the will in that behalf, and by the same deed assigned the sum of 5,000*l.* to the Respondent.

Thomas Rutledge by his will, dated the 14th of May, 1797, devised to the Respondent all his real property, and also bequeathed to him all his

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personal property, and appointed him sole executor, and died in the month of March, 1805; whereupon Richard Rutledge, in the will of Peter Rutledge the elder, named, and to whom an estate for life was by that will devised by virtue of the limitations therein contained, became entitled, and entered into possession of the lands and estates by the will limited for the term of his life, with remainder to his first and other sons in tail male.

The Respondent, in the lifetime of Thomas Rutledge, got possession of all the lands comprised in the lease of 1736, and after the death of Thomas Rutledge he was allowed by Richard Rutledge to remain in the possession of the lands, on payment of the same rent as was originally reserved by the lease.

Richard Rutledge died in the month of August 1811, without issue; and thereupon the Appellant, David Rutledge, under the limitations in the will of Peter Rutledge (the testator's nephew William, to whom an estate for life was by the will devised, being then dead without male issue) became seised in possession of the lands so devised for the term of his natural life; and the Appellant, William Rutledge, became entitled to an estate in tail male in all the said lands expectant on the decease of the Appellant, David Rutledge, his father.

In the lifetime of Richard Rutledge, the Respondent filed his bill in the Court of Chancery, against Richard Rutledge, the Appellant David Rutledge, and the heir at law of the surviving trustee named in the will of the testator, Peter Rutledge, thereby praying, that the sum of


5,000*l.* might be decreed a valid charge on the lands by the will limited, and that a competent part thereof might be sold for payment of said sum of 5,000*l.* and the interest thereon, since the decease of Thomas Rutledge, to which bill the several Defendants thereto put in their answers; and the Respondent, on the 17th of July, 1819, obtained a final decree of the Court of Chancery, whereby it was decreed, that there was then due to the Respondent the sum of 7,436*l.* 19*s.* 8*d.* for principal and interest, on the the foot of the charge of 5,000*l.* and the said sum, with interest thereon from that day, was thereby decreed to be a charge on the lands and premises; and it was ordered, that the same sum should be paid off by the Defendants in the suit within six months, to be computed from the date of the decree, and in default thereof that the several lands whereof the testator was so seised in the county of Mayo, or a competent part thereof, should be sold; and that the Respondent, out of the money arising from such sale, should be paid the sum so decreed to him, with interest and costs.

The Appellants, on the 15th of November, 1819, exhibited their bill in the Court of Chancery in Ireland, against the Respondent and others, thereby, among other things, praying, that the will of Peter Rutledge the elder, might be established and carried into execution, and that the Appellant, David Rutledge, might be decreed entitled to an estate for life, and the Appellant William Rutledge, to a vested estate tail in all the lands whereof the testator was seised in fee; and that discharged from any grants, conveyances or incumbrances, created or procured by Thomas

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Rutledge, except under the power and authority by the said will to him given; and that it might be decreed, that the said Thomas Rutledge was bound to elect between the said marriage articles of the 10th of November, 1743, and the said will; and that he had no right to take both under the said articles and will at the same time; and that it might be decreed, that the said Thomas Rutledge did, in his lifetime, elect to take and hold under the said will; and that he thereby relinquished all estate and interest in the said lands, created or provided by the said articles of 1743; and that the Respondent, Robert Rutledge, should be bound by such election, and might be decreed to account with the Appellant, David Rutledge, for the profits of the said lands comprised in the said indenture of 1736, since the death of the said Richard Rutledge, and that the same should be set off against the sum by the said decree of the 17th of July, 1819, decreed to the said Respondent, on foot of the said charge of 5,000*l.*; and further, that in case the said Court should not be of opinion, that the said Thomas Rutledge did so elect the said Respondent, as being assignee, legatee, devisee, and personal representative of the said Thomas Rutledge, might be decreed to be bound to elect between the said will of the said Peter Rutledge the elder, and any estate or interest which he claimed in any part of the said lands, under any will or conveyance of or from the said Thomas Rutledge; and that it should be decreed, that the said Respondent did elect to claim under the will, and that it was by so electing, he was entitled to the said charge of 5,000*l.*, under the power by the said will created.

The Respondent filed his answer to the bill; but the Appellants did not prosecute their suit to a hearing.

In the mean time, the Respondent, on the 24th of December, 1819, filed his bill in the Court of Chancery against the Appellants, thereby setting forth the indenture of 1736, the marriage articles of the 10th of November, 1743, the will of Peter Rutledge the elder, and his death; and that Thomas Rutledge thereupon became seised of the demised lands for the term of his life, under the devise thereof to him contained in the will, and was also, under the articles of 1743, entitled to the equitable estate for the term of his life, in the lease of 1736; and that Peter Rutledge the younger was entitled to a *quasi* estate in tail male in remainder therein; and also setting forth the settlement on the marriage of Peter Rutledge the younger, bearing date the 8th of August, 1776, and his death without issue, the several conveyances hereinbefore mentioned, made by the said Thomas Rutledge to the Respondent, also the will of Thomas Rutledge, the seisin for life, and the decease of Richard Rutledge, in the year 1811; and charging that on the death of the said Richard Rutledge without issue, the Appellant, David Rutledge, under the will of Peter Rutledge the elder, became seised of an estate for life in the said lands, subject to the covenant for perpetual renewal; and also charging that the Respondent had applied for a renewal to the Appellant David Rutledge, of the lease of 1736, and that the Appellant had declined specifically to execute the covenant for perpetual renewal, contained in the indenture of 1736; and praying, among other

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things, that the Respondent might be decreed entitled to have the said original lease renewed, pursuant to the covenant for perpetual renewal therein contained; and that the said covenant might be specifically executed by the Appellants, and for that purpose that it might be referred to by one of the Masters of the Court, to take an account of the sum due by the Respondent to the Appellant David Rutledge, on foot of the rents and renewal fines under the original lease, and the renewals thereof, and that the Appellants might be compelled to execute a renewal to the Respondent for the lives in the bill in that behalf mentioned, or such lives as the Master should insert.

To this bill the Appellants filed their joint and several answer, on the 31st of January 1820, thereby insisting that Thomas Rutledge did not become seised of an equitable estate, under the lease of 1736, and that Peter Rutledge the younger, did not become entitled to an estate in *quasi* tail male, in remainder therein: and that Thomas Rutledge and Peter Rutledge the younger, had no right to make such disposition as in the settlement of the 7th and 8th of August, 1776, is contained, respecting the lease of 1736; and that for the reasons therein mentioned, the Respondent was not entitled to the specific execution of the said covenant for perpetual renewal, in the lease of 1736 contained.

The cause was brought on for hearing, upon pleadings and proofs, before the Lord Chancellor of Ireland, on the 22nd day of February, 1821, who decreed that the Respondent was entitled to a specific execution of the covenant for perpe-

tual renewal in the lease of the 3d of April, 1736, in the pleadings mentioned, according to the true intent and meaning thereof; and accordingly, that on payment to the Appellant, David Rutledge, of the sum due in respect of rent and renewal fines, the Appellants should execute to the Respondent a renewal of the lease for the lives in the Respondent's bill named, or for such other lives as the Master should approve of; and that in case the parties should differ as to the amount due, in respect of such rent, or as to the form of such deed of renewal, that it should be referred to Roderick Connor, one of the Masters of the Court, to take an account of the sum due to the Appellant, David Rutledge, in respect of such rent and renewal fines, and also to approve of a proper deed of renewal, to be executed by the parties pursuant thereto, &c.

Against this decree the appeal was presented.

For the Appellants—*Mr. Horne* and *Mr. Sugden*.


By the acquisition of the fee-simple and inheritance of the lands by *Peter Rutledge* the elder, in the year 1743, his lease for lives thereof became merged, and the rent thereby reserved was extinguished, and the lease is not now subsisting for any purpose whatsoever. *Peter Rutledge* the elder, having so acquired the fee-simple and inheritance of the lands, he by his will devised the same and several other estates to the use of *Thomas* for life, and bequeathed all his leases for lives and years, and the residue of his personal estate, to *Thomas*, and thereby raised a necessity for *Thomas* to elect between the articles and the

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will, and *Thomas* accepted all the benefits accruing under the will, and thereby concluded his election, and the Respondent is bound thereby.

The Respondent, by claiming the sum of 5,000*l.* and interest, which *Peter* the elder, by his will empowered *Thomas* to charge upon his estates of inheritance in the county of Mayo, and which *Thomas* accordingly charged in favour of the Respondent, has elected to take under the will, and is thereby precluded from claiming any interest in the lands, by a title which is opposed to or inconsistent with the will.

The lands in which the Respondent claims such title and interest, were part of the estates of inheritance, which the testator, *Peter* the elder, made chargeable, and *Thomas* charged with the sum of 5,000*l.* and interest, and the Respondent, while he seeks the benefit of such charge on the one hand, ought not at the same time to be permitted to claim under the party who executed the same in his favour, any of the lands themselves which were subject thereto.

The testator, *Peter* the elder, by his will expressly declared his intention to be, that all his acquisitions should go together, according to the uses thereby limited, and that *Peter* the younger should settle to those uses such interest as he was entitled to in the lands in question, under the articles of the 10th November, 1743, (that interest being a *quasi* estate tail, and the use limited to him by the will, being an estate for life), and the testator with that view, authorized *Thomas* to deprive *Peter* the younger, his son, of the use for life thereby limited to him in case he should refuse so to settle the interest, but the settlements

of 1776, and 1787, and the several subsequent conveyances executed by *Thomas* are in effect directly opposed to such intention and desire of the testator, inasmuch as thereby his acquisitions are separated, and made to descend in a different manner and to different persons, and such settlements and conveyances are a fraud upon the said will, and ought not to be supported by a Court of equity.

If the lease for lives was not merged by the acquisition of the fee simple and inheritance by *Peter* the elder, yet the *quasi* reversion of the lands expectant on the failure of issue male of *Thomas*, was by the articles of 1736 reserved to *Peter* the elder, and such reversion passed by his will, whereby he limited his estates to such uses as aforesaid, in strict settlement, and *Thomas* being by that will a mere tenant for life, could not make any valid disposition, either at law or in equity, of such reversion as he assumed to do by the settlement of 1787, under which the Respondent claims.

It was further argued at the bar, that the articles of 1743 might operate as a covenant to stand seised.* That a remainder limited to the heirs of the grantor is the old reversion, and the limitation ineffectual.† That when the limitations are complete, it makes no difference whether the

* *Roe v. Tranmer*, Willes 682. 2 Wils. 75. S. C. *Foxe v. Wilcox*, 2 Rolle's Abr. 783. See also 2 Rolle's Abr. 784. *Doe v. Whittingham*, 4 Tau. 20. 22 Vin. Abr. 194. *Crossing v. Scudamore*, 1 Vent. 137. 1 Mod. 175, S. C. in Exch. Ch. *Lade v. Baker*, 2 Vent. 149. *Osman v. Sheafe*, 3 Lev. 370. *Walker v. Hall*, 2 Lev. 213. *Smith v. Risley*, Cro. Car. 529.

† *Read v. Erington*, Cro. Eliz. 321.

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estates are legal or equitable.* That the sons of Thomas, if they did not take an estate tail, took a fee, and if so, it vested, and the contingent remainders were gone.† That the remainders were barred, and the estate complete, by the settlement of 1776, and by the renewals.‡

For the Respondent—*Mr. Pepys and Mr. Knight.*

Peter Rutledge the elder, by the settlement of 1743, became a trustee of the lease of 1736, for the several persons entitled to equitable estates therein under that settlement, and these equitable estates could neither merge in the legal fee subsequently acquired by him, nor be in any respect prejudiced by such acquisition. The testator, Peter Rutledge, does not by his will make or affect to make any disposition of the lease of 1736, and clearly treats it as a subsisting interest, so that no implied duty of election arises upon the will. The power given by the will of the testator, Peter the elder, to Thomas, to deprive Peter the younger of the life estate, thereby limited to him, in the event of his marrying without his father's consent, or refusing, at the desire of his father, to settle the freehold lease of 1736 to the same uses to which the inheritance was limited, was plainly discretionary in Thomas, and to be exercised or not at his will and pleasure, and as this power never was exercised

* *Jervoise v. Duke of Northumberland*, 1 J. and W. 571.

† *Doe v. Perryn*, 3 T. R. 484.

‡ *Blake v. Blake*, 3 P. W. 10, n. 1. *Wasteney v. Chapple*, cited in *Norton v. Frecker*, 1 Alk. 525.

by Thomas, the case in which Peter would have been expressly bound to elect, never arose.

On the 28th of July, the judgment was affirmed, on the motion of the Lord Chancellor, who said, that he had looked with attention through the papers, and thoroughly considered the case, but could not advise the House to disturb the judgment.

Judgment affirmed.

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(COURT OF CHANCERY.)

CHARLES BUTLER - - - - *Appellant*

THOMAS SNEYD KYNNESELEY, JOHN
RICKMAN, RICHARD WILLIAMS, } *Respondents.*
and JOHN ALLAN POWELL -

C. by his will, devised his lands in trust for G. his brother, for life, remainder to his sons in strict settlement in tail male, remainder to S. the testator's sister, for life, remainder in like manner to her sons, remainder to K. for life, without impeachment of waste, remainder in strict settlement to his sons in tail male, remainder to S. for life, with like remainder to his sons, remainder to the testator's right heirs. The lands were accordingly conveyed by the trustees named in the will to these uses.

G. died without issue, leaving S. his heir at law, and she married P. and with her husband levied a fine of the reversion which had descended to her on the death of G. to such uses as S. should appoint, and she died, having appointed the reversion to P. during the joint lives of himself and A. until A. should attain twenty-one, or marriage, remainder as to one moiety to P. for life, and as to the other moiety to A. for life, remainder as to the whole estate to the sons, &c. of A. in tail, remainder (subject to a term) to P.

K. entered upon the death of S. and died, devising his real estates, charged with his debts, and bequeathing his personal estate to T. K. against whom a bill was filed, charging that K. during his possession of the lands, had committed equitable waste, by cutting trees planted, &c. for ornament, and praying that an account might be taken of the trees cut, and the value, and that T. K. as representative of K. might pay the amount out of his assets. A decree was made according to the prayer of the bill. But before the Master had proceeded under the decree, the question of value, and all matters in difference between the parties, were by an order of the

Court, by consent, referred to an arbitrator, appointed by the Master under the order, and arbitration bonds were executed by the parties. The arbitrator by his award found that a sum of £3871. which included the value of the timber cut, was the balance due to the plaintiff, and directed that sum to be paid. An application being made to enforce the payment of the money according to the award, the defendant presented a petition of re-hearing, which suspended the proceedings upon the award, and the case having been re-heard, the bill was dismissed, but no order was made respecting the award. Upon appeal against this decree, held that the House could not proceed until there should be a judgment upon the whole of the proceedings before the Court below, and a special order was made, by which the Appellants had leave to withdraw their appeal, for the purpose of obtaining the judgment of the inferior Court upon the question as to the award.

Semb. That such a reference as above stated, submits the law as well as the fact to the arbitrator.

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IN 1816, *Walter* late Marquis of *Ormonde*, and *Anna Maria Catherine* Marchioness of *Ormonde*, his wife, filed their bill of complaint, in the High Court of Chancery, against the Respondent *Thomas Sneyd Kynnersley*; thereby stating, among other things, the will of Godfrey Bagnall Clarke, bearing date the 4th of December, 1774, whereby he devised all his real estates, after satisfaction of the debts and legacies therein mentioned, upon trust, to convey the said estates to the use of his brother Gilbert Clarke and his assigns, for life, without impeachment of waste; with remainder to trustees, to preserve contingent remainders; with remainder to his first and other sons, severally and successively in tail male; with remainder to his the said testator's sister, Sarah Price Clarke,

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for life, without impeachment of waste; with remainder to trustees to preserve contingent remainders; with remainder to her first and other sons severally and successively in tail male; with remainder to Clement Kynnersley for life, without impeachment of waste; with remainder to trustees to preserve contingent remainders; with remainder to his first and other sons severally and successively in tail male; with remainder to Wenman Samuel for life, without impeachment of waste; with remainder to trustees to preserve contingent remainders; with remainder to his first and other sons severally and successively in tail male; with remainder to the testator's own right heirs for ever.

The bill further stated, that the testator died in December 1774, without having revoked or altered his will, leaving his brother, Gilbert Clarke, his heir at law, and that after the testator's decease, the trustees, in execution of the trusts of the will, paid the testator's debts and legacies, and afterwards conveyed the real estates to the several uses by the will declared, or such of them as were then subsisting or capable of taking effect; that the testator's brother, Gilbert Clarke, died without issue, and intestate as to the ultimate reversion in fee in the real estates, and that he left his sister Sarah Price Clarke his heir at law, and that she afterwards intermarried with Job Hart Price, who thereupon assumed the name of Clarke, and entered upon the testator's real estates, under the limitations in his will contained, and continued in the possession thereof until the death of Sarah Price Clarke, which happened in the year 1801; and that Sarah Price

Clarke left issue male one son, namely, Godfrey Thomas Robert Price Clarke, and the Plaintiff Anna Maria Catherine Marchioness of Ormonde, then Anna Maria Catherine Clarke, and no other issue; and that upon the death of Sarah Price Clarke, her son Thomas Godfrey Robert Price Clarke, under the limitations of the said will, and the deeds of conveyance executed pursuant thereto, became entitled in possession to the estate; and that he was since dead, without issue, under the age of twenty-one years; and that upon the death of Thomas Godfrey Robert Price Clarke, Clement Kynnersley, as the next tenant for life of the estates under the limitations of the will, entered into possession of the estates, and so continued until his death.

The bill then stated that Clement Kynnersley died in April 1815, without issue: And that Job Hart Price Clarke, and Sarah his wife, duly levied a fine of the reversion in fee of the testator's estates, which were then vested in Sarah Price Clarke as heiress at law, to him, or to her other brother Gilbert Clarke; and that they, by proper assurances duly executed, limited the reversion in fee simple of such estates, expectant upon the determination of the prior uses to which the same were limited by the will of the testator, to such uses, intents and purposes as Sarah Price Clarke, whether covert or sole, by her will in writing should direct or appoint; and that Sarah Price Clarke, by her will, executed conformably to the terms of the power in that behalf vested in her, by the fine and declaration of the uses thereof, devised the reversion expectant on the failure of the estates then subsisting, to trustees, upon

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trust to convey and settle the same to the uses and intent that her daughter the Plaintiff, the Marchioness of Ormonde, then Anna Maria Catherine Clarke, or her guardian or guardians during her minority, or until she should marry with consent in writing of such guardian or guardians, should receive an annuity of 1000*l.* for maintenance, and subject thereto to the use of the said Job Hart Price Clarke and his assigns, without impeachment of waste, during the joint lives of Job Hart Price Clarke and the Plaintiff the Marchioness of Ormonde, then Anna Maria Catherine Clarke, until she should attain twenty-one years, or be married; then to the use and intent that one moiety of the estates, in case Job Hart Price Clarke should be living, but if dead, then that the whole should be limited to one or more trustees to be nominated by the Plaintiff, the Marchioness of Ormonde, then Anna Maria Catherine Clarke, during her life, to her sole and separate use, notwithstanding any coverture; and as to the other moiety to the use of the said Job Hart Price Clarke and his assigns, for life, without impeachment of waste, with remainder, after the death of the said Plaintiff the Marchioness of Ormonde, as to one moiety of all the said estates, in case the said Job Hart Price Clarke should be then living, but if dead, then as to the whole of the said estate, after the decease of the said Plaintiff the Marchioness of Ormonde, to her first and other sons successively in tail male, with remainder to her daughters in tail with cross remainders; with remainder, subject to a term of one thousand years, thereby directed to be vested in one or more trustee or trustees, for the purpose

of raising money for the payment of certain legacies, to the use of Job Hart Price Clarke, his heirs and assigns for ever.

The bill further stated, that the mansion-house and park at Sutton-cum-Duckmanton, was an ancient family seat; and that there were at the time when Clement Kynnersley entered into the possession thereof, many timber and other trees standing and growing in the park, and near the house, which served for ornament and shelter thereto, and were a great ornament and embellishment to the mansion-house and park, and were planted for that purpose; and that Clement Kynnersley, during the time he was so in possession of the mansion-house, lands and premises, felled and cut down many of the ornamental timber trees, or trees planted for ornament or shelter, which were standing in the park and about the house; and also divers saplings and young trees, not nearly come to maturity, and which were growing on other parts of the estate, and various spring woods, which grew on the estates, prematurely and before the same, according to the usage of the country, were arrived at the proper state for cutting; and he sold and disposed thereof for a very large sum of money in the whole, which he received and applied to his own use; and he committed other acts of waste, spoil and destruction upon the devised estates; and that Wenman Samuel, the tenant for life, in remainder, expectant on the decease of Clement Kynnersley, without issue male, died in his life-time; and the Plaintiffs, and Job Hart Price Clarke, being interested in the estates in manner aforesaid, made frequent applications to Clement Kynnersley,

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requesting him to desist from felling and cutting the trees and woods, and from committing any other waste, spoil and destruction on the estate; and also to account for the produce and value of the timber and wood so felled, cut, and sold, or disposed of by him; but Clement Kynnersley did not attend to or comply with such requests.

The bill then stated, that Job Hart Price Clarke died, having by indentures of lease and release, bearing date respectively the 15th and 16th days of June, 1809, conveyed all his estate and interest in the demised premises to the Plaintiff the late Marquis of Ormonde, and his heirs, and by means thereof, and of the several limitations aforesaid, the Plaintiff and his wife, who had not any issue upon the death of Clement Kynnersley, became entitled in possession to the before-mentioned estates; that Clement Kynnersley made and published his will, bearing date the 21st day of January, 1815, and thereby devised and bequeathed his freehold, copyhold and leasehold estates in the county of Stafford, to his nephew the Respondent Thomas Sneyd Kynnersley, his heirs, executors, administrators and assigns; and he thereby gave and bequeathed his real estates at Carshalton, and all other his real and personal estate to the Respondent Kynnersley, his heirs, executors, administrators and assigns, he or they paying all his debts, funeral and testamentary expences, for which purpose he declared it to be his desire, that his estate at Carshalton should be sold, in case his personal estate and effects should not be sufficient to pay the same, and appointed the Respondent Kynnersley, sole executor of his will: And that upon the death of Clement

Kynnersley, the Respondent Kynnersley, whom he left his heir at law, proved his will, and became his legal personal representative, and possessed his personal estate and effects to an amount more than sufficient to pay all his just debts, &c.; that upon the decease of Clement Kynnersley, the Plaintiffs the Marquis of Ormonde and Anna Maria Catherine his wife, entered into the possession of the estates devised by the will of Godfrey Bagnall Clarke, and being entitled as aforesaid, they frequently applied to the Respondent Kynnersley to come to account for the ornamental trees, or trees planted for ornament or shelter, which were standing and growing on the estates, and also of the other trees and woods improperly felled and sold by Clement Kynnersley, and to pay to the Plaintiffs the value thereof with interest, which he refused to do.

The bill prayed an account of all timber and other trees growing in or near the mansion-house and park, and which were ornamental thereto, or which were planted for ornament or shelter thereto, and of other trees or woods growing on the estates unfit for felling, and which were felled and sold, or otherwise disposed of by Clement Kynnersley deceased, and of the monies received by him on the sale of such of them as were sold, and of the value of such of them, if any, as were not sold by him; and that his estate might be declared liable to make good the produce or value of the timber and other trees and woods which should appear to have been improperly felled; and that the Respondent Thomas Sneyd Kynnersley might be compelled to pay the same to the Plaintiffs accordingly, or into Court, for the benefit of the

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person or persons ultimately to be entitled to the inheritance of the estates; and that the Respondent Thomas Sneyd Kynnersley might either admit assets, or that an account might be taken of the personal estate and effects of Clement Kynnersley, and of the rents and profits of the real estates devised in aid thereof by his will, and if necessary, that such will might be established, and the trusts thereof decreed to be carried into execution.

The Respondent Thomas Sneyd Kynnersley put in his answer to the bill on the 6th of December 1816, denying the alleged waste, and referring to an answer of Clement Kynnersley, put in to a bill filed in the year 1807, by Job Hart Price Clarke; Walter Marquis of Ormonde then Earl of Ormonde, and Anna Maria Catherine his wife.

The answer of Clement Kynnersley referred to in the answer of the Respondent Thomas Sneyd Kynnersley, was put in in the month of June, 1808, and it was thereby admitted by Clement Kynnersley, that he had in the years 1805 and 1806 cut down timber and other trees in Sutton Park, to the value of 3,223*l.* 19*s.* 8*d.* but insisted that he had a right so to do.

To this answer the Plaintiffs replied, and issue being joined, witnesses were examined, and their depositions taken and published.

Walter Marquis of Ormonde, in Michaelmas term 1818, exhibited his bill of revivor and supplement against the Respondents Thomas Sneyd Kynnersley, and John Rickman, Richard Williams and John Allan Powell, stating the death of his wife, and her will, by which, under a power,

she appointed, devised, and bequeathed all the residue of her real and personal estates to the Plaintiff, his heirs, &c. and appointed the Respondents, Rickman, Williams, and Powell, and P. Gell, executors of her will, and Gell having renounced the other executors, with consent of the Plaintiff obtained letters of administration with the will annexed. The bill prayed that the suit might be revived, and that Rickman, Williams, and Powell might state their claims on the monies sought to be recovered in the suit.

The Respondents, Rickman, Williams, and Powell, by their answer claimed an interest in the monies, but submitted to have the suit revived.

The Respondent, Thomas Sneyd Kynnersley, having also put in his answer, the suit was revived.

The cause came on to be heard before the Vice Chancellor, on the 6th of May, 1820, when his Honour decreed that the Plaintiff's bill, so far as it sought an account of dilapidations of the buildings on the estate in question in this cause, should be dismissed, without prejudice as to the question of costs: and it was ordered, that it should be referred to one of the Masters of the Court, to inquire whether Clement Kynnersley, in the year 1804, or at any time subsequent, cut or felled any timber or other trees which were planted or left standing for ornament or shelter of the mansion-house or park in the pleadings mentioned, or any other timber or trees growing on the estates in question, that were unfit for cutting and felling; and if the Master should find, that Clement Kynnersley did cut any such timber or other trees, then it was ordered that the Master should enquire whether the same or any part thereof were sold

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by him, and at what price: and it was ordered, that the Respondent Thomas Sneyd Kynnersley should be charged with such price; and if the Master should find that any part of such timber or trees was not sold, he was to set a value thereon: and it was ordered, that the Respondent Thomas Sneyd Kynnersley should be charged with such value: and it was declared, that the Respondent Thomas Sneyd Kynnersley was liable to answer out of the assets of Clement Kynnersley, what should be found due for the amount of the price or value which should be so found due by the Master, who was to state any special circumstances at the request of either party, &c.

On the 7th of August, 1820, and while such proceedings were pending, the Plaintiff the Marquis of Ormonde died, having made and published his will, bearing date the 28th day of February, 1820, whereby he appointed George Marquis of Huntly, Sir James Graham, Baronet, and the Appellant, executors; Sir James Graham and the Appellant alone proved the will.

By an order, dated the 8th day of March, 1821, the suit was revived.

By an order made in the case, bearing date the 13th of March, 1822, it was ordered, with the consent of the Respondent Thomas Sneyd Kynnersley, and all others the parties to the cause, that it should be referred to the Master to approve of a proper person to be the arbitrator or arbitrators of the matters in difference in the cause, as also all other matters in difference between Sir James Graham and the Appellant, as personal representatives of the Marquis of Ormonde, and the Respondent Thomas Sneyd Kynnersley, as

executor of Clement Kynnersley: and it was ordered, that the Master should settle and approve of proper bonds, to be entered into by Sir James Graham and the Appellant, and the Respondent Thomas Sneyd Kynnersley, for that purpose.

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In pursuance of this order, the Master made his report, bearing date the 30th of July, 1822, whereby he certified, that upon the nomination and by consent of the parties, he approved of Hugh Parker to be arbitrator, and of two arbitration bonds, each of which was made in the penal sum of 10,000*l.* for the performance of the award, so that the arbitrator should make the same ready to be delivered to the parties on or before the 1st of February, 1823, which time was extended by two successive orders.

An award, bearing date the 25th of November, 1823, was made and executed by Hugh Parker, whereby he awarded and directed that Respondent Thomas Sneyd Kynnersley should pay to Sir James Graham and the Appellant, on the 12th of February, the sum of 3,871*l.* of lawful money of Great Britain, in full of all their claims as personal representatives of the Marquis of Ormonde, against the Respondent Thomas Sneyd Kynnersley as executor of Clement Kynnersley: And he further awarded and directed certain payments to be made in respect of costs and releases to be executed.

In February 1824, a motion was made before the Vice Chancellor that the award might be made an order of the Court in the cause and be performed. This motion stood over upon a suggestion that proceedings would be taken to set aside the award, upon the ground that the re-

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representative of Job Hart Price Clarke (if any one) was entitled to the proceeds of the timber cut down.

The Vice Chancellor intimated that this was a proper ground for a re-hearing.

Sir James Graham died on the 23d of March, 1825, leaving the Appellant the sole surviving personal representative of the Marquis of Ormonde.

In the month of April 1825, the Respondent Thomas Sneyd Kynnersley presented his petition to the Court of Chancery, stating among other things, that he conceived himself to be aggrieved by the decree, except so far as it directed the bill to be dismissed, so far as it sought an account of dilapidations, and that he was advised that the whole of the bill ought to have been dismissed with costs; and therefore praying, that the cause might be re-heard before the Vice Chancellor, which was ordered.

The cause was re-heard on the 23d of April, 1825, when the Vice Chancellor ordered that the decree should be reversed, and that the Plaintiff's bill should be dismissed.

Upon the subject of the award, the arbitration bonds, and the order directing the reference, nothing was done.

The appeal was against the decree of the 23d of April, 1825.

For the Appellant—*Mr. Sugden.*

The original hearing in the Court below, is reported in 5 Madd. p. 369. The point then discussed was simply on the question of equitable waste. According to my note, the Vice Chan-

cellor said it was a creature of equity, and that there was a breach of trust. The note goes beyond the report in Maddocks, in stating more fully the ground of the decision to be breach of trust. There was evidence as to the fact of equitable waste. The decree only directs inquiry as to equitable waste. There was evidence that timber was cut contrary to the custom of the country, and in the park. There were trees planted, and growing for ornament, and an inner row of oak trees. Timber growing to exclude objects is entitled to protection.* The original decree directs only inquiry, and only as to equitable waste as a breach of trust. It was held that legal waste stood on a different ground. The original decree decided that the assets of the tenant for life were liable for the equitable waste.

Besides this, where a decree is taken by consent it cannot be reversed. A consent order must purport to be so on the face of the order. By an order of 13th of March, 1822, it is stated "that all matters in difference should be submitted to the arbitration of a person to be appointed by the Master, and the parties consenting, the Master of the Rolls by consent orders, &c." A court of equity will not enforce an agreement to refer, unless it is made under its own authority in a cause. An award has been regularly made; all this being done, and the decree which is the foundation being taken away, it might be sufficient to leave the case here.

The ground of the decree on the rehearing was that Clarke had the reversion in fee. The question was in whom the right to the money pro-

* Day v. Merry, 16 Ves. 375.

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duced by the timber so cut is vested. It was held that the right to the money vested in Clarke. The decree is wrong for two reasons;—1st, Because Lord Ormonde is the first person entitled to the estate of inheritance. 2ndly, Because if it belonged to Clarke, it passed by the conveyance to Lord Ormonde. Money arising from the cutting such timber is by the Court settled to go in the same course as the estate.

It is a settled rule, that a remainder man in tail takes money absolutely; but as money so produced is considered as real estate in such cases, it is held that it does not belong to the tenant in tail, till he acquires the dominion over the estate. No doubt there was a right in him, but the question is, whether the right remained with him? The trees could never have been enjoyed as a separate article of property. The money goes as the trees would, until a party having an estate of inheritance comes into possession.

The Lord Chancellor.—Was the objection arising from the award before the Court?

For the Appellant.—

No.

For the Respondent.—

The question arose upon the attempt to enforce the award; the subject therefore must have been distinctly before the Court.

The Lord Chancellor.—But it does not appear that it was argued.

For the Appellant.—

The fact of its being by consent was not before the Court.

The Lord Chancellor.—What has been done under the award?

For the Appellant.—

It was stopped by the decree on the re-hearing. The decree was not altered on the ground of non-liability.

Lord Eldon.—Suppose the House were to reverse the decree; the cause must go back for the purpose of proceeding upon the arbitration; and what could you do till the arbitration is complete? If reversed, must the House say that the arbitration shall be completed?

For the Appellant.—

We only want the decree of reversal removed.

Lord Eldon.—I wish to know how this award is to be got rid of?

For the Respondent.—

We should have a good case to get rid of the award, if we support the decree. The only consent was to appoint an arbitrator.

Lord Eldon.—Is not this an order of the Court? Have you a copy of the petition of re-hearing?

For the Appellant.—

The decree on re-hearing appears to be merely a decree dismissing the bill.

The Lord Chancellor.—What then is to become of the award? There must be a distinct application to get rid of the award. The petition of re-hearing takes no notice of the award. If a cause is going on, and you agree to refer, do you not take the chances?

Lord Eldon.—There is a difficulty on both sides. The petition of re-hearing takes no notice of the award, and you go before the Vice Chancellor taking no notice of the award. The question is

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whether you should not have brought the matter as to the award before the Court.

The Lord Chancellor.—They seem to have begun at the wrong end; they should first have impeached the award.

Lord Eldon.—The Plaintiff says I am entitled to the money arising from the sale of trees cut down by an act of equitable waste; that is the question: if he is so entitled, than another question arises as to what is due to him. If you say that he did not refer the matter of title, that is another question.

For the Respondent.—

The representatives of Clarke are not before the Court, and his creditors might claim.

Lord Eldon.—That might be the subject of objection on your part.

The Lord Chancellor.—But as long as the award stands, there can be no proceedings. May not this arbitration by consent operate as a reference of the fact and the law together: and if so, how can we decide until the matter is brought before us? If they left the whole question to the arbitrators there may be an end of the cause. If the award cannot be set aside, is not that conclusive?

For the Respondent.—

We must establish the decree before we can make any application as to the award; there is no objection on their part against the order for re-hearing.

The Lord Chancellor.—What was done upon the application to pay the money into court?

For the Appellant.—

The payment was stopped by this proceeding.

Lord Eldon.—Is the decree signed by the Chancellor? it should be so stated in the petition of appeal. It may be hard that you should have to pay the money over again: but have you not referred the question upon the title?

The Lord Chancellor.—The question of the award should have been before the court at the same time with the question of re-hearing.

For the Respondent.—

The award we may not be able to set aside.

Lord Eldon.—If you will admit that, we may go on. The matter as to the award is original matter, and not within the jurisdiction of the Court of Appeal.

The Lord Chancellor.—Can you point out any way in which the validity of the award can be questioned in the Court below. Any question of law might have been raised upon that submission.

Lord Eldon.—When you consent to the reference can it be said that you did not either refer the right or admit it? The submission would be nonsense without such a construction.

The Lord Chancellor.—All matters in difference comprise every thing both of fact and law.

For the Respondent.—

The objection made is upon matters subsequent, contrary to all principle and practice.

The Lord Chancellor.—The appeal must be withdrawn that the parties may go before the Chancellor, in order that the decree and the award may be considered together.

After this observation the argument upon the

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case was stopped, and the following special order was made.

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It appearing to this House, that upon the rehearing before the Vice Chancellor, when the decree of reversal complained of by the said appeal was made, the effect of the award was not discussed before the Vice Chancellor, and which award appears still to remain in force; this House thinks it proper, and it is therefore ordered, that the Appellant, upon withdrawing his appeal, shall be at liberty to present a petition of appeal to the Lord Chancellor against the Vice Chancellor's decree of reversal; the Appellant and Respondent being also respectively at liberty to make such motions or other applications to the Lord Chancellor touching the said award, and for the confirmation or setting aside thereof, as they may be advised to make, such motions, or other applications, to be heard at the same time with the petition of *rehearing*, so to be presented as aforesaid, or at such time or times as the Lord Chancellor shall direct. And it is further ordered, that the cause be remitted back to the Court of Chancery, to proceed therein accordingly, reserving to each party the right of appealing from any order or decree to be made herein by the Court.

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APPENDIX.

 SCOTLAND.

(COMMISSARIES COURT AND COURT OF SESSION.)

MARY BLACK MACNEILL - - - *Appellant.*MALCOLM MACGREGOR - - - - *Respondent.*

In May 1816, a marriage ceremony between M. and G. (according to the evidence of one witness, who spoke positively to the performance of the ceremony, and the identity of the parties, confirmed by another witness, who spoke with less firmness as to the identity) was performed by a minister of the Church of Scotland, upon the production of an instrument, purporting and proved to be a certificate of a proclamation of banns, which proclamation, from the date of the certificate as compared with a registrate of the marriage and the evidence of the witnesses, could not possibly have been made. But it was proved to be the usual certificate, and that according to the practice in Scotland at the time, banns were in fact scarcely ever proclaimed, when such certificates were given. The minister who performed the ceremony had afterwards been banished for forgery, and collusion in effecting a marriage, and became incompetent to give evidence, but a book kept by him, in which the marriage in question appeared to be regularly entered, was produced, and proved by the wife and daughter of the minister, who also proved the performance of the ceremony.

M., who had afterwards married another husband, upon a suit to establish the first marriage, in her defences admitted that one evening in May 1816, by means of threats, and particularly of personal injury to a rival suitor, who afterwards became the

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second husband, she was induced to go, and went with G. to the house of the minister before mentioned, but from the agitation of her mind, that she was incapable of paying attention to what then passed, and was convinced that she did not consent to the marriage. She also admitted that after the ceremony she returned with G. to her father's house, but denied the consummation.

It was in evidence that M. was in the habit of calling upon G. at his printing office, late in the evening and alone; and that after the ceremony of marriage, in speaking of it, she said "it was not binding: what would two or three words of an outlawed man do?" It was also in evidence, that on two occasions, in the presence of her father, she was addressed, and her health drank, by the name of Mrs. G., which salutation was in one instance returned, and in another received without observation by her or her father. It was also in evidence, that upon two occasions J., the second husband, after his marriage came to the house of M. when G. was there, and went secretly to an upper room, where he remained alone.

The marriage with G., as alleged, took place in May 1816. In June 1816, a marriage was regularly solemnized between M. and J. It was proved that G. before his alleged marriage with M. had admitted that J. was a more favoured suitor; that upon the marriage between M. and J. he had accepted a present of a pair of gloves; that he had been frequently present in social parties with J. and M., to whom he drank by the name of Mrs. J.; that he slept in the same room where M. and J. were in bed together as man and wife, and in all his intercourse with them, which was very frequent, recognised them as such.

Two years after the marriage of M. and J., and their cohabitation, G. raised an action in the Commissaries Court against M. of declarator of marriage and adherence. There was issue of the marriage between M. and J., but neither the children nor J. were made parties.

Held (reversing the judgment below) that if a celebration of the ceremony of marriage took place between M. and G., it was to be presumed, under the circumstances before stated, that there was no real consent to marry.

Whether it is necessary that the second husband, and the children should be parties to the suit. *Quære.*

Semb. That according to the practice of the Ecclesiastical

Court, it is only necessary to make the principal a party, but that the other parties interested may intervene if they think fit, at any stage of the suit.

Supposing that the evidence had been deemed sufficient to warrant a declarator of marriage between M. and G., whether a sentence of adherence ought also to have been pronounced. *Quære.*

Upon a summons which alleges an irregular marriage, followed by consummation, and a regular marriage celebrated with a view to complete the irregular marriage, whether proof of the latter marriage, no proof being given of the former, would be a sufficient proof of marriage. *Quære.*

Whether after judgment upon such a summons, and proof negating the alleged regular marriage, a new action could be brought to establish the irregular marriage. *Quære.*

Whether according to the law of Scotland, entries made in a book kept by a minister of the Church of Scotland, in the manner above described, are admissible in evidence to prove a marriage; and how marriages are to be proved, supposing the minister and witnesses to be dead, or incompetent. *Quære.*

Whether the admissions of a woman who may be claimed as a wife by two persons, under such alleged ceremonies of marriage, and circumstances as above stated, is admissible in evidence as proof of the first marriage. *Quære.*

Whether a marriage celebrated by a minister of the Church of Scotland, upon such certificate as above mentioned, without actual publication of banns, is to be deemed, according to the practice, a regular marriage in Scotland. *Quære.*

Assuming it to be an irregular marriage, previous and subsequent conduct of the parties is admissible evidence upon the question of consent.

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THIS was an appeal from certain judgments pronounced by the Commissary Court and the first division of the Court of Session, in an action of Declarator of Marriage, at the instance of the Respondent, against the Appellant.

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The summons was for a declarator of marriage and adherence, filed in the Commissaries Court on the 25th of March 1818: "It set forth, that "an intimate acquaintance having for some time "subsisted betwixt the Pursuer and Mary Macneill, sometimes called Mary Black Macneill, "the reputed natural daughter of the late Dr. "James Macneill of Stevenston, by Euphemia "Black, they formed an attachment, and agreed "to become husband and wife of each other; and "accordingly, when they were together at Holytown, in the county of Lanark, in spring 1816, "on a jaunt, in company with the said Dr. James "Macneill, an irregular marriage between them "was celebrated by the said Dr. James Macneill; "and the marriage was consummated by their "spending several nights together in the same bed, "at Holytown aforesaid: That on the Pursuer "and the said Mary Macneill, or Mary Black "Macneill, returning to Edinburgh from the said "jaunt, which they did in the month of May "1816, they considered it proper that no time "should be lost in celebrating, *in facie ecclesie*, "that marriage which had been irregularly "contracted between them at Holytown aforesaid; and accordingly they were, in the "month of May 1816, regularly married by "the Reverend Joseph Robertson, Minister "of the Chapel in Leith Wynd, Edinburgh." Notwithstanding of all which, the said Mary Macneill, or Mary Black Macneill, casting off the fear of God, and forgetting her natural and Christian duty and promise made at her entering into said marriage with the Pursuer, now refuses to acknowledge her marriage, or to cohabit with

him as her husband : therefore the Pursuer, Malcolm Macgregor, ought to have our sentence and decreet, finding and declaring, that he and the said Mary Macneill, sometimes called Mary Black Macneill, Defender, are lawful married persons, husband and wife of each other ; and decerning and ordaining the said Defender to adhere to, and cohabit with the Pursuer, and treat and entertain him in all respects as her husband ; and further decerning and ordaining the said Defender to make payment to the Pursuer, of the said sum of 100*l.* sterling, as the expenses of this process, &c.

In the defences which were given in on the 1st of May 1818, the Appellant admitted the acquaintance, and the journey to Holytown, but denied “ that a marriage was there celebrated by the Doctor, or that she either then or at any other period, consented to become the Pursuer’s wife.” On the other point she gave the following statement : “ The Defender recollects perfectly well that the Pursuer, some time in the month of May 1816, made proposals of marriage to her, which she rejected, informing him, at same time, that she was pre-engaged with Mr. Jollie, her present Husband. Notwithstanding of this, some short time thereafter, the Pursuer called at Dr. Macneill’s house, between ten and eleven o’clock at night, by which time the Doctor had retired to his bed room ; and by means of threats, particularly of personal injury to Mr. Jollie, he prevailed upon her, or rather forced her, to accompany him to Edinburgh, and that he carried her to a house, which she afterwards understood was that of Joseph Robertson’s ; and, although from the agitation of her mind at

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“ the time, she could pay no attention to what
“ might then pass yet she is convinced that in no
“ situation would she consent to marry the Pur-
“ suer, or break her engagement with Mr. Jollie,
“ to whom she was sincerely attached, and had
“ resolved to marry.”

She then proceeds to state, “ that having a
“ short time thereafter been married to Mr. Jollie,
“ the Pursuer on that occasion was presented
“ with, and accepted a pair of gloves, as one of
“ their friends, and frequently hereafter visited
“ them in the Doctor’s house, and only discon-
“ tinued his visits from the month of December
“ last.”

In the answers to these Defences, the Respon-
dent desired that the Appellant should be judi-
cially examined, as to the facts stated in the
summons, which was ordered by the Court, but
the Respondent afterwards declined to avail him-
self of the right.

The Court then appointed a Condescendence,
and the Respondent, on the 23d of April 1819,
put in the following :—

1. That having paid his addresses in the way of
marriage to the Defender, who was living unmar-
ried in the house of her reputed father, Dr.
Macneill, with the approbation of the said Dr.
Macneill, the Pursuer accompanied Dr. Macneill
and the Defender in an excursion to Lanarkshire,
in the month of May, 1816, for the purpose of
visiting an estate belonging to Dr. Macneill, in
the parish of Bothwell.

2. That in the course of this excursion, the
parties slept several nights at the inn at Holytown,
which is in the same parish with Dr. Macneill’s

estate ; and while in that inn, Dr. Macneill stood up and solemnly bestowed the hand of his daughter the Defender upon the pursuer as her husband, and gave the parties his blessing. That the Defender acquiesced in this by taking the Pursuer's hand ; and while at the inn at Holytown, the Pursuer and the Defender slept in the same room for two nights, when the irregular marriage which had been previously solemnized by Dr. Macneill in the way here mentioned, was consummated.

3. That while upon this journey, the Pursuer was treated by the Defender and by her father in such a way as induced the tenants on Dr. Macneill's estate, and others in whose company they happened to be, to believe that the Pursuer and the Defender were either actually married, or were solemnly betrothed to each other as husband and wife. That the parties returned from this excursion to Edinburgh on the 20th May, 1816 ; and the Defender after her return to her father's house in Leith Walk, where she generally resided, admitted to various persons that an irregular marriage had been solemnized between the Pursuer and the Defender at Holytown, when she had accepted the Pursuer as her husband ; and that this irregular marriage had been afterwards consummated.

4. That immediately upon their return to Edinburgh, the Pursuer and Defender thought it proper that their marriage should be regularly solemnized by a clergyman without any further delay ; and with the view to this marriage, the Defender made the usual preparations in the way of dress which are customary on such occasions. In particular, she gave to Margaret Kinlay, who

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is since married to a person of the name of Shewen, residing in Leith Walk, three gowns to be made for herself on the occasion of her marriage, also a marriage shift for herself and a marriage shirt for the Pursuer; all which articles she desired should be got ready by a particular day, with a view to the regular solemnization of her marriage with the Pursuer. And further, she requested the said Margaret Kinlay to officiate as her bride's-maid on that occasion.

5. That in pursuance of this resolution, the Pursuer obtained a certificate of proclamation of banns in the usual form; and thereafter the Pursuer and the Defendant proceeded, on the evening of Thursday, the 23d of May, 1816, from Dr. Macneill's house, near the bottom of Leith Walk, to the house of the Reverend Joseph Robertson, minister of the chapel of ease in Leith Wynd, Edinburgh, for the purpose of having their marriage regularly solemnized by that person. That upon arriving at Mr. Robertson's house, they made application to him to solemnize the marriage, producing to him at the same time the certificate of the proclamation of banns, and they were accordingly that evening regularly married by Mr. Robertson, according to the forms of the Church of Scotland, in the presence of Mr. Robertson's wife and his daughter; and the marriage was entered in a book kept by the said Reverend J. Robertson, as a record of the marriages which he solemnized.

6. That after the marriage was thus solemnized, the Pursuer accompanied the Defender from Mr. Robertson's house to the house of Dr. Macneill, in Leith Walk, and there the marriage was con-

summed, by the Pursuer sleeping in the same bed with the Defender.

7. That the Defender has, upon a variety of occasions, admitted to sundry persons that she was married to the Pursuer by the Reverend Mr. Robertson as above mentioned, and that she thereafter slept with the Pursuer as her husband, in her father's house.

These facts the Pursuer undertakes to prove by the evidence of (Here follow the names of the witnesses.)

On the 21st of May, 1819, the Appellant put in answers, by which, before making special answers to the articulate condescendence, she recalled the attention of the Court to the defence originally stated by her, and to the facts specially mentioned in the first part of her answers to a petition given in by the Pursuer. It was therein stated, that so far from the Pursuer having then had any idea that the Appellant was his wife, that, on the contrary, he not only knew of the previous courtship between Mr. Jollie and her, and that they were to be married, but at the time of the marriage he was presented with gloves, which he accepted of; and being considered as one of their most intimate friends, he repeatedly visited them, drank to them as husband and wife, by the names of Mr. and Mrs. Jollie; and when he so repeated these visits, was in the practice of partaking of their family fare, always acknowledging them to be husband and wife. It therefore appears a most extraordinary circumstance, the Pursuer afterwards claiming the Appellant as his wife, a person who may have been said to have been married with his consent and approbation to Mr.

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Jollie, her present husband ; and so far from this having given him offence at the time, that, as already mentioned, he visited and acknowledged them as married persons, and as such was entertained by them. When, however, the Pursuer first pretended to say that the Appellant was his wife, it appeared that his object was merely selfish, as he offered to renounce the claim of a husband upon condition that she and Mr. Jollie would pay him a sum of money ; so that if they had complied with his wish, no such action as the present would have appeared in Court.

The Appellant submitted that before the Pursuer should be allowed to enter upon his proof of the condescendence, the above special facts should be discussed, and a proof thereof allowed to the Appellant ; or should the Court be inclined to allow the Pursuer to proceed with his proof in the mean time, the Appellant should also be allowed a proof of what she then stated, with what follows as the answers to the articulate condescendence.

The Appellant then proceeded to answer the condescendence.

Art. 1. The Defender denies this article, excepting in so far as regards the circumstance of the Pursuer's having accompanied Dr. Macneill and the Defender first to Holytown and afterwards to Glasgow. In May 1816, the Pursuer mentioned to Dr. Macneill that he had occasion to go to Glasgow, and would accompany him to Holytown if he inclined. Dr. Macneill acquiesced, and the Pursuer accompanied Dr. Macneill and the Defender to Holytown, and afterwards persuaded Dr. Macneill to go the length of Glasgow.

Art. 2. This article is denied.

Art. 3. This is also denied.

Art. 4. This is denied, in so far as regards the Defender's having any view of a marriage with the Pursuer, making preparations on that account, or employing Margaret Kinlay to make a shirt for the Pursuer, and requesting her to officiate as bride's maid on occasion of the alleged marriage. Dr. Macneill, when in Glasgow, gave money to the Defender to purchase there three gowns, and she employed Margaret Kinlay to make them; but she denies her then having any view of a marriage with the Pursuer.

Art. 5. The Defender recollects that, some time in May 1816, the Pursuer made proposals of marriage to her, which she declined, informing him of her being pre-engaged with Mr. Jollie, now her husband. Notwithstanding of this, some short time hereafter, the Pursuer called at Dr. Macneill's house one evening about nine or ten o'clock, by which time he had retired to his bedroom, and by means of threats, particularly of personal injury to Mr. Jollie, the Pursuer prevailed on her to accompany him to Edinburgh, and he conducted her to a house, which she afterwards understood to be that of Joseph Robertson; and although, from the agitation of her mind at the time, she was incapable of paying attention to what then passed, she is convinced that neither then, nor at any time, did she consent to marry the Pursuer, or break the engagement she had come under with Mr. Jollie.

Art. 6. The Defender admits that the Pursuer accompanied her back from the house of Joseph Robertson to Dr. Macneill's House, where she

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retired to her own room, and the Pursuer staid all night in a separate room below; but there is no truth in his allegation of there having been any marriage, or consummation of marriage, betwixt her and the Defender, either then or at any other period.

Art. 7. This article is denied.

The Commissaries allowed the Respondent a proof of the fourth, fifth, and sixth articles of the condescendence, being those relating to the solemnization of the marriage in Edinburgh, superseding consideration of the other articles, "until the proof now allowed shall be led and concluded." By a subsequent interlocutor, on the 20th of August, the Commissaries allowed a proof of the remaining articles of the condescendence.

The evidence produced by the parties, as it finally appeared in the prints before the House on the appeal, was as follows:—

On the part of the Respondent the proof was professedly confined to the allegation in the summons of a regular marriage at Edinburgh; the proof of the allegation of the irregular marriage at Holytown having been abandoned.

Charles Macpherson deponed, that the Appellant was in the constant habit of calling for the Respondent, and that the behaviour of the parties led to the general belief that a courtship was going on; that her visits to the Respondent at the printing house were frequent, sometimes twice or three times a week; that she was sometimes accompanied by her father, and sometimes alone. "Depones, that when the Pursuer came alone to the office, she sometimes called as late as eight

“ or nine o'clock at night, at other times during
 “ the day, Depones, that when she called in
 “ company with her father, he does not recollect
 “ of her calling later than about two or three
 “ o'clock in the day. Depones, that on some of
 “ the occasions, the Pursuer left the office with
 “ the Defender when she came alone, and did not
 “ return again to the office that evening.

Margaret Kinlay deponed, “ that she remem-
 “ bers that the Defender once mentioned to the
 “ Deponent, that her father, Dr. Macneill, wished
 “ to give her, the Defender's, hand to Malcolm
 “ Macgregor, the Pursuer, when they were toge-
 “ ther at Glasgow, but, as she said to the Depo-
 “ nent, she, the Defender, refused to marry him
 “ there, or till they came home, or something to
 “ that purpose; but she, the Deponent, cannot
 “ recollect her precise expressions.” This wit-
 “ ness afterwards mentions, that she was asked to
 “ be the bride's maid. Miss Macneill said, “ when
 “ she asked me to be the bride's maid, that her
 “ marriage was to be private, and that it was to
 “ take place in Edinburgh; that the gentleman,
 “ and a friend of his, were to come in a coach to
 “ meet her at the minister's, but she neither men-
 “ tioned the intended husband's name, or his
 “ friend's, or the minister's, or the name of the
 “ place where she was to be married; she just
 “ said that the gentleman was to come with his
 “ friend in a coach, to meet us at the minister's
 “ house in Edinburgh.” The witness could not
 “ attend; and “ it was some weeks after the time
 “ fixed for the marriage, that I asked Miss Mac-
 “ neill if her marriage with Mr. Macgregor was
 “ done; and she answered me, No; and added,

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“ I am going to marry a man I like better, as I
“ have before deponed to.”

Mrs. Christian Macnaughton being interrogated
“ if she ever knew of Dr. Macneill, and the
“ Defender and Pursuer going on a jaunt to Ste-
“ venston, in the west country, in the month of
“ May 1816? depones, and answers, yes, I heard
“ her speaking of it. Interrogated, what she
“ said of the journey? deponed, the Appellant
“ said, that when they were in an inn on the
“ journey, with the Respondent, and Dr. Mac-
“ neill had gone to bed, there was only another
“ bed room with two beds in it, and the innkeep-
“ er’s wife, or woman who kept the inn, asked
“ her if she had no objections to sleep in the same
“ room with Mr. Macgregor? that there were
“ no curtains on the bed, and she objected to the
“ want of them; and said, if she would hang
“ sheets round the beds, she would have no ob-
“ jections: that she said that the woman hung
“ sheets round the beds, and Mr. Macgregor and
“ the Defendant slept in the same room in dif-
“ ferent beds that night.”

Mr. Smyth, writer to the signet, made the fol-
lowing deposition:—“ I recollect him (the Re-
“ spondent) speaking to me, some time after the
“ execution of Dr. Macneill’s second deed of set-
“ tlement, in April 1816, about his marriage with
“ the Defender, which was to be at the Black
“ Bull Inn that evening, at nine o’clock, and wish-
“ ing me to be present; but I was unwell at the
“ time, and confined to the house; but I said,
“ Mr. Court, my clerk, might go; and I think I
“ called Mr. Court, and mentioned it to him, and
“ he said he would go; and Mr. Macgregor said

“ he would call back at nine, but he did not call
 “ at the hour ; and some little time thereafter, I
 “ said to Mr. Court, you had better go to the
 “ Black Bull, Mr. Macgregor may be expecting
 “ you there ; and Mr. Court went to the Black
 “ Bull ; and some little distance of time there-
 “ after, he called back and told me he could
 “ hear nothing about him. Interrogated, when
 “ this took place ? depones, and answers, this
 “ happened nearer the end of May than the
 “ beginning of it. Mr. Smyth being interro-
 “ gated, if the Pursuer called upon the depo-
 “ nent, and informed him that he had been
 “ married to the Defender in Edinburgh, and
 “ by whom ? depones, and answers, yes, he
 “ did. Interrogated, if that was long after the
 “ evening that Mr. Court went to the Black
 “ Bull ? depones, and answers, it was some dis-
 “ tance of time after,—not so much as a month,
 “ but more than a week. I think he said they
 “ had been married by Mr. Robertson.”

The Respondent referred, in evidence of the certificate of proclamation of banns having been obtained, to an extract from the books of the session clerk, of the following tenor:—“ Re-
 “ gistrate of marriage.—Edinburgh, twenty-first
 “ day of May, eighteen hundred and sixteen.—
 “ Malcolm Macgregor, printer, Old Church Pa-
 “ rish, and Mary Macneill, St. Cuthbert’s Pa-
 “ rish, daughter of Dr. James Macneill, Edin-
 “ burgh.”

Mr. Andrew Masson, the son-in-law of Mr. Wilson, session clerk in the city of Edinburgh, deponed, “ That he made the entry in the day-
 “ book kept at his father-in-law’s, which is now

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“ exhibited to the deponent, and which is in the
“ following terms —

“ 22d May, 1816.

“ Malcolm Macgregor, printer, Old Church
“ Parish, and Mary Macneill, St. Cuthbert's Pa-
“ rish, daughter of Dr. James Macneill, Edin-
“ burgh. That the parties are free; unmarried,
“ of legal age, and not within the forbidden de-
“ grees, and he has resided upwards of six weeks
“ in Edinburgh, is certified by James Macdonald,
“ running stationer, Edinburgh, and Patrick Neill,
“ printer, Edinburgh.

“ E (Signed) “ Malcolm Macgregor.
“ Js. Macdonald.

“ Depones, that the entry of the above, trans-
“ ferred into the office day-book, in the following
“ terms, also exhibited to the witness, is also in
“ the deponent's hand writing:—

“ Edinburgh, 22d May, 1816.

“ Malcolm Macgregor, printer, Old Church
“ Parish, and Mary Macneill, St. Cuthbert's Pa-
“ rish, daughter of Dr. James Macneill, Edin-
“ burgh. Certy^d by James Macdonald, run-
“ ning stationer, and Patrick Neill, printer, Edin-
“ burgh.

(Signed) “ Malcolm Macgregor.
“ Jam. Macdonald.”

Being specially interrogated, he depones, “ that
“ in no case was it the practice to transfer any of
“ the entries in the house day-book, kept at his
“ father-in-law's, to the office day-book, unless
“ certificates had been given out to the parties.”
Then adding a qualification, which does not ap-
ply to the present case, he proceeds, “ that he is

“ quite certain, that, with the exception now
 “ mentioned, certificates were issued in all cases
 “ where the entries appear to have been trans-
 “ ferred. The deponent being now shown the
 “ copper-plate form of proclamation of banns
 “ in process, depones, that it is the form of cer-
 “ tificate in use to be given out by the session
 “ clerk in the year 1816, and the same is marked
 “ by the Commissary Examiner, and deponent,
 “ as relative hereto.”

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The copper-plate form of certificate referred to, runs in the following terms :—

“ Marriage. Edinburgh, 181
 “ That the parties are free, unmarried, of legal
 “ age, and not within the forbidden degrees, and
 “ resided in Edinburgh upwards of six
 “ weeks preceding the proclamation of banns, is
 “ certified to me, for which I shall be answerable.
 “ And are orderly proclaimed in several churches
 “ in this city, in order to marriage, and no ob-
 “ jections made why the same may not be solem-
 “ nized, is certified by ——”

He depones “ that the entries in the office day-
 “ book were transferred into a folio book in the
 “ office, called the registrar of marriage ;” and
 upon the interrogation of the Appellant, he re-
 peats his conviction, that a certificate of procla-
 mation of banns must have been granted, in the
 present case, and the grounds upon which that
 conviction rests.

Robert Bow, the present session clerk, being
 interrogated as to the extract from the register of
 marriages, being dated 21st of May, 1821, when
 it is entered in the day-book of date 22d May?
 “ depones and answers, it must be a mere mis-

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“ take of mine in transferring the entry from the
“ day-book to the register, and the date 22nd
“ being placed below instead of above. Inter-
“ rogated, if he is satisfied from the evidence of
“ the entries appearing in the different books
“ above deponed to, that a certificate of procla-
“ mation of banns must have been given out at
“ that time in the form above deponed to? de-
“ pones and answers, I have no doubt of it.
“ Interrogated, if the entry in the register, above
“ deposed to, shews the date of the certificate of
“ proclamation being issued by the session clerk,
“ or if it shews the date of the celebration of the
“ marriage? depones and answers, it shews the
“ date of which the lines were got out, but not
“ the date of the marriage.”

The Reverend Dr. Macknight depones, “ That
“ he is one of the ministers of Edinburgh, and
“ has been so for nineteen years past. Depones
“ that he has officiated as clerk to the presbytery
“ of Edinburgh for thirty years past. Depones,
“ that the old regulations in regard to the pro-
“ clamation of banns were not strictly attended
“ to at and previous to the year 1816. Inter-
“ rogated, whether at and previous to the year
“ 1816, the deponent, as a clergyman of the city
“ of Edinburgh, would have celebrated a mar-
“ riage betwixt a gentleman residing within the
“ city and a lady residing in the parish of St.
“ Cuthbert’s, on the production of the certificate
“ of the proclamation of banns then in use by the
“ session clerk of the city of Edinburgh, without
“ his requiring also a certificate of a similar na-
“ ture from the session clerk of the parish of St.
“ Cuthbert’s? depones and answers, I always

“disapproved of the practice, but found it so
 “common that I certainly did celebrate marriages
 “on such certificates of proclamation from one of
 “the parties only; and that, in consequence, I
 “was anxious to obtain that alteration in the form
 “of proclamation which has since been adopted
 “by the presbytery, a copy of which is now
 “shewn to me.” And “The copper-plate en-
 “graving of the certificate of proclamation of
 “banns in use to be issued by the session clerk
 “of the city of Edinburgh, in the year 1816, and
 “referred to in the depositions of Robert Bow
 “and Andrew Masson, being shewn to the de-
 “ponent, and also the entry of the attestation
 “for a certificate of proclamation of banns, in
 “order to marriage betwixt the parties, of date
 “the 22nd May, 1816, contained in the house
 “day-book kept by Adam Wilson, referred to in
 “the deposition of Andrew Masson, being also
 “now shewn to the deponent, and interrogated,
 “whether, if the copper-plate form of this certi-
 “ficate had been regularly filled up in confor-
 “mity to the entry contained in the day-book,
 “and duly signed by the session clerk, the depo-
 “nent would, on such certificate of proclamation
 “of banns, have celebrated the marriage betwixt
 “the parties? depones and answers, most un-
 “doubtedly I would; it was what was done every
 “day, by which I mean very commonly.”

Mr. Bow, the session clerk, depones, “That in
 “1816 it was the practice for clergymen to consider
 “the parish of St. Cuthbert’s, and the parishes in
 “the city of Edinburgh, as the same, and to mar-
 “ry parties upon single lines from either parish.”

Mrs. Margaret Robertson, the wife of the Re-

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verend Joseph Robertson, by whom the ceremony was performed, depones, that her husband “ kept
“ a book, in which, so far as I know, he generally
“ recorded the marriages celebrated by him ; and
“ being shewn a book produced by the Pursuer,
“ and now subscribed by the deponent, and
“ Judge-Examinator, as relative hereto, which
“ commences on the 1st of January, 1814, and ap-
“ pears to end upon the 26th of November, 1817 ;
“ and the deponent being interrogated, whether
“ that is the book so kept by her husband, and
“ by whose hand it is written ? depones, and
“ answers, it is the book that was kept by my
“ husband, and is wrote by him. And being
“ particularly desired to look at the entry in that
“ book, under the date of twenty-third May,
“ eighteen hundred and sixteen, ‘ married Mal-
“ ‘ colm Macgregor, printer, Old Church Parish,
“ ‘ and Mary Macneill, St. Cuthbert’s Parish,
“ ‘ daughter of Dr. James Macneill, Leith Walk.
“ ‘ Town Lines ;’ and interrogated, if that entry
“ is in the handwriting of her husband ? depones,
“ and answers, yes. Interrogated, were you
“ present at this marriage ? depones, and answers
“ yes. And again being interrogated, do you
“ perfectly recollect that there was a marriage in
“ your house, and celebrated in your presence
“ by your husband, upon the 23d of May 1816,
“ as specified in the book ? depones, and answers,
“ I recollect of it being, but I cannot recollect
“ the precise date. Interrogated, about what
“ hour did the marriage to which you allude
“ take place ? depones, and answers, between
“ nine and ten o’clock in the evening I think ; I
“ cannot be certain. Interrogated, did you see

“any marriage lines produced? depones, and
 “answers, I know that they brought lines with
 “them; I saw them in my husband’s hands, either
 “when he was celebrating the marriage, or be-
 “fore or after the celebration. He generally
 “held the lines in his hand while he was cele-
 “brating marriages. Interrogated, did you your-
 “self read the paper that you call lines? depones,
 “and answers, I really think I did, I believe I
 “did.” Her deposition closes as follows: “Re-
 “interrogated for the Pursuer, did the parties in
 “the marriage to which you allude conduct
 “themselves in the ceremony, in the same man-
 “ner as parties do on similar occasions, or did
 “you observe any thing particular? depones,
 “and answers, they behaved just in the usual
 “manner; I did not observe any thing particu-
 “lar.—Re-interrogated for the Defender, was it
 “your husband’s practice to put questions to the
 “parties when he performed the ceremony? de-
 “pones, and answers, It was his practice to ask
 “parties if they were willing. Interrogated by
 “the Court, have you any doubt he did so upon
 “the occasion to which you allude? depones,
 “and answers, none whatever.”*

Mary Robertson, the daughter of the former witness, being interrogated, “do you know

* This witness did not recognise the Appellant when pointed out to her upon the examination; and as to Macgregor, she admitted that she had never seen him before the ceremony; and being much pressed, as to how she could recollect so well his identity, answered, “Indeed, I know very little about it; I am so unwell to day, I am unable to answer questions.” “I recollect his face, I cannot be more particular.” She also stated, that she believed there was a lighted candle in the room when the ceremony was performed.

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“ the Defender ? depones, and answers, I have
 “ known her by sight for several years, but I
 “ never spoke to her. And being shewn the
 “ book produced during the examination of the
 “ preceding witness, and interrogated, depones,
 “ that for more than fourteen years past her
 “ father recorded the marriages he celebrated ;
 “ and the book produced, which she has now seen
 “ and examined, is of her father’s handwriting.
 “ Interrogated, depones, that the entry under
 “ date the 23d of May 1816, ‘ married Malcolm
 “ ‘ Macgregor, printer, Old Church Parish, and
 “ ‘ Mary Macneill, St. Cuthbert’s Parish, daugh-
 “ ‘ ter of Dr. James Macneill, Leith Walk.—
 “ ‘ Town lines,’ is of her father’s handwriting.
 “ Interrogated, depones, that the deponent was
 “ present at this marriage. Interrogated, do
 “ you know the Pursuer, Malcolm Macgregor, now
 “ in Court ? depones and answers, yes ; I recollect
 “ the face ; he was one of the parties then married ;
 “ I did not know him before the marriage, nor have
 “ I been acquainted with him since. Interrogated,
 “ what hour did the marriage take place ? depones,
 “ and answers, late in the evening before supper.
 “ Interrogated, was there any candle lighted ? de-
 “ pones and answers, No ; I think there was not,
 “ I cannot recollect that there was any. Interro-
 “ gated, did you see any marriage lines ? depones,
 “ and answers, I did not see any lines, but I
 “ asked my father if there were lines ; he an-
 “ swered me, that the Pursuer had town lines. I
 “ put this question before the ceremony was per-
 “ formed ; I had not been present at any mar-
 “ riages for several years before, and had some
 “ delicacy about attending as a witness, which

“ led me to put the question.” She also depones, “ that the deponent had often before been present at the celebration of marriages, and the marriage in question was celebrated in the usual manner, and solemnly and deliberately.”

The entry in the record of the marriages kept by Mr. Robertson, was in the following terms: “ Twenty-third May, eighteen hundred and sixteen,—Married Malcolm Macgregor, printer; Old Church Parish, and Mary Macneill, St. Cuthbert’s Parish, daughter of Dr. James Macneill, Leith Walk.—Town lines.”

The Judge-Examinator certifies, “ that he has examined the volume of the record of marriages produced: that it appears to contain upwards of one thousand different entries of marriages therein recorded, in regular order of date, with the exception of fifty-three, which are entered separately upon five leaves at the end of the book, in writing which, the pages are reversed, and which are marked as omitted in their place.” He also certifies, “ that the fifty-three marriages recorded as omitted in their proper places, are in other respects, regularly entered, and that the marriage now in question is not one of those, but appears to be regularly entered, at the time of celebration, in its proper place.”

The certificate granted by the minister, is in the following terms: “ Edinr. Carrubber’s Close, May 29, 1816,—These are to certify, that Mr. Malcolm Macgregor, printer, and Miss Mary Macneill, after producing regular marriage lines from the sessions clerks of the city, were married, before witnesses, by me,

“ Joseph Robertson, Minister.”

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Janet Nicholson depones, " In spring, last year,
 " I drank tea at the house of Archibald Mac-
 " naughton, type founder, in St. Patrick Square,
 " in company with Mr. and Mrs. Macnaughton,
 " and Mr. and Mrs. Jollie, that is, Mary Black,
 " they call her Mrs. Jollie; there was no other
 " person present but myself. I cannot recollect
 " the precise time of the year. I was sent for
 " by the Defender, and I went home from that
 " company between eight and nine at night, and
 " it was good day-light when I went home. In-
 " terrogated, was there any conversation about
 " the Defender's marriage in that company? de-
 " pones and answers, the Defender, with whom I
 " had been intimate, said to me, in presence of
 " the company I have mentioned, that she had
 " been married to Mr. Macgregor, but she could
 " by no means think of living with him, and that
 " she preferred Mr. Jollie, and that she would lay
 " down her life for him. I do not recollect all
 " she said, nor the precise words. Interrogated,
 " depones, she asked me if I was married to Mr.
 " Macgregor, and said I ought to have sent her
 " livery, that is, wedding favours. I answered her
 " that she was married to him, and that she should
 " have sent livery first to me. I was urged to
 " confess that I had been married to Mr. Mac-
 " gregor. I never made any confession to Mary
 " Black or Mr. Jollie that I had been married to
 " him. Depones, Mary Black, in this company
 " at tea, said that she had been married to Mr.
 " Macgregor by the Reverend Joseph Robertson.
 " I asked her if she had lines? she answered,
 " What do I know? She Mary Black mentioned,
 " that Mr. Robertson had said, when he married

“ them, how does such an old man get such a young wife? or something of that nature.”

“ Interrogated, if the Defender ever said any thing to the deponent respecting what she had done with the marriage lines? depones and answers, I don’t recollect exactly what she said about the marriage lines; I think she said something about giving them to Mr. Jollie, or something about Mr. Jollie having burned them. Mr. Jollie told me himself that he had gone to Mr. Macgregor about the marriage lines before he had married the Defender.” A question being put to this witness as to her having several natural children by the Respondent, she declined to answer.*

Mrs. Macnaughton depones, that (in spring 1818) “ she was sent for by the Defender. There was a deal of conversation betwixt Janet Nicholson and Mary Black, she having wished Janet Nicholson much joy, to which Janet Ni-

* This witness also gave the same evidence as Mr. and Mrs. Macnaughton, as to the allegation of Mary Macneill respecting the pretence by which she was induced to leave home, and the threats by which Macgregor prevailed on her to go to Mr. Robertson’s for the purpose of being married. She deposed also to the expression of the Appellant, “ What will two or three words of an outlawed man do?” She deposed further, that the next day after this conversation, she went to the Respondent’s printing office with Dr. Macneill, who told him that Jollie was a better marriage for Mary, and that he would not consent to the Respondent’s marriage with her: that the Appellant afterwards met the Respondent by his appointment, and in company with Jollie, when Jollie asked him if there was anything between him and the Appellant but the marriage lines of Joseph Robertson, to which he answered that there was not, and he desired the Appellant to take and burn them, and wished her and Jollie all happiness.

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“ cholson returned some answer, but I am not cer-
“ tain what it was. Mary Black began and told
“ Janet Nicholson about her having been before
“ Mr. Joseph Robertson; but how it began, I do
“ not recollect exactly. That she described her-
“ self as being induced to leave her father’s house
“ that evening, by the pretence that her presence
“ was necessary to settle some business with a
“ Mr. Bridges. She said she did not know
“ where she was when she went into Mr. Joseph
“ Robertson’s; and she said that Mr. Macgregor
“ had used threats to induce her to go to Mr.
“ Robertson’s, and said at the foot of the stair,
“ that he would burn her deeds if she did not go,
“ which deeds of her property, Mr. Macgregor,
“ she said, had keeping at that time.* That she
“ said Mr. Macgregor said he would employ one
“ Macdonald, Esq. to stab Mr. Jollie, if she did
“ not go to Mr. Robertson’s, and that Mr. Mac-
“ gregor would go to London.”

Mr. Macnaughton depones, “ that the Defender
“ said that Mr. Macgregor took out his pocket-
“ book, and gave him either a note or marriage
“ lines, she could not say which, and he made no
“ objections to perform the ceremony.” Janet
Nicholson deponed, that “ she said that that mar-
“ riage was not binding: what the devil signified
“ two or three words of a minister?” Mrs. Mac-
naughton interrogated, “ if she ever heard Mary
“ Black, the Defender, say any thing about her

* This allegation refers to a matter which was in evidence upon the additional proof, that in April 1816 deeds were prepared under the direction of Macgregor, and executed by Dr. Macneill, by which he gave his property to the Appellant, and the deeds were left in the custody of the Respondent.

“ marriage not being binding with Mr. Macgregor ?
 “ depones and answers, O yes, she said that
 “ night that it was not binding ; she said, what
 “ will two or three words of an outlawed man
 “ do ? ” Mr. Macnaughton deponed, “ when Ja-
 “ net Nicholson came in, Mary Black, the De-
 “ fender, addressed her as having been married ;
 “ to which Janet Nicholson said, that she was
 “ married herself to the person she mentioned,
 “ which was Mr. Macgregor. Interrogated, if
 “ he ever heard the Defender say any thing about
 “ the marriage not being binding ? depones and
 “ answers, yes, I have heard her say it was not
 “ binding, on account of Mr. Robertson being
 “ afterwards under sentence of banishment by
 “ the Court of Justiciary for forging lines.”

William Allan deponed, “ that the Pursuer was
 “ in the habit of sleeping in Dr. Macneill’s house
 “ all night, at different times during the period of
 “ the deponent being there ; ” though, upon being
 interrogated, “ whether, upon that oath, he had
 “ ever seen the parties in bed together ? depones
 “ and answers, I never did see them in bed toge-
 “ ther, nor does it consist with my knowledge
 “ that they ever were so.”

Mr. White, lapidary, depones, that in June
 1816, *i. e.* immediately after the marriage, “ the
 “ Pursuer, with whom he has been long acquaint-
 “ ted, came to the deponent’s shop, and got three
 “ gold rings, and a brooch of Ayrshire jasper
 “ which he had bespoke, and for which he paid
 “ the deponent. Depones, that he was accom-
 “ panied by the Defender and Dr. Macneill.” He
 “ also depones, that while the rings were making
 “ the Defender tried a ring upon her finger, to see

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“ if it would suit; she came to my shop with the Pursuer when she tried it.” And he concludes as follows: “ Depones, about the month of June I made a gold brooch of a Brazil stone, by Mr. Macgregor’s order, and, as he said, for the Defender. Interrogated, depones, I also furnished, by Mr. Macgregor’s orders, a stone for the head of a cane, which he said he was to present to Dr. Macneill. Interrogated, depones, and answers, when the jasper brooch was delivered, Dr. Macneill being much fatigued, was in my room with Mr. Macgregor. He said to Mr. Macgregor, ‘ this will cost a deal of money, but it does not signify; it will be all yours.’ Interrogated, depones, and answers, there was a glass of rum handed on this occasion. The Defender was also in the room. I drank to her, saying, ‘ Mrs. Macgregor, your health;’ she said nothing, but she also drank to me.”

Mr. Neill, printer in Edinburgh, depones, “ that he is acquainted with the parties in this cause, and was also acquainted with the late Dr. Macneill of Stevenston. Depones, that he carries on the business of printing in Edinburgh, and that the Pursuer has wrought with him and his father as printer for upwards of twenty years. Depones that he has frequently seen Dr. Macneill and the Defender calling for the Pursuer at his printing office. Interrogated, depones, that he recollects, in the summer of 1816, calling at Dr. Macneill’s house in company with the Pursuer, who had previously informed him of his marriage with the Defender. Depones, that upon his return from England,

“ in the beginning of the month of June that
 “ year, he was informed by the Pursuer of his
 “ marriage to Miss Macneill, and the Pursuer
 “ requested the deponent, that in consequence
 “ of his being so, he, the deponent, would call
 “ upon her at her father’s in Leith Walk, in com-
 “ pany with him: that the deponent begged that
 “ he would allow him to delay his call till after
 “ the rising of the session, in consequence of the
 “ great press of business at the time; and he
 “ accordingly delayed calling for a day or two
 “ after the rising of the session in July, when he
 “ called with the Pursuer, as deponed to. De-
 “ pones, that they were cordially received by the
 “ Defender, and the deponent recollects of her
 “ shaking him, the deponent, by the hand, when
 “ she received them. Depones, that he recollects
 “ her going for her father, Dr. Macneill; and the
 “ deponent recollects, upon the doctor’s coming
 “ into the room, that he went up to the Pursuer
 “ and took one of the Pursuer’s hands in both of
 “ his, shaking hands with him in a fondling
 “ manner, and upon the Pursuer mentioning the
 “ deponent’s name to him, the doctor politely
 “ came up to the deponent and shook hands, and
 “ conversed kindly with him. Depones, that the
 “ conversation was very general, and that there
 “ was nothing said, as far as he recollects, about
 “ the marriage of the parties, but he recollects
 “ of inviting Dr. Macneill and the parties to
 “ come to his house, and that the invitation was
 “ accepted by them. Interrogated, depones, that
 “ he recollects of some spirits and water being
 “ brought into the room before his coming away.
 “ Interrogated, whether any healths were drank

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“ upon the occasion? depones, and answers, I
“ most distinctly recollect of drinking the de-
“ fender’s health by the name of Mrs. Macgregor,
“ it was the only opportunity I had of shewing
“ what was the object of my visit, which was to
“ visit them as a new-married couple, and I
“ therefore most distinctly recollect it; there
“ was nothing particularly marked in my way of
“ drinking her health, further than that I distinctly
“ called her Mrs. Macgregor, and drank to her
“ by that name. Depones, that she returned the
“ salutation, and drank the deponent’s health.”

Janet Stove, after mentioning that she recol-
lects the celebration of the marriage between the
Appellant and Mr. Jollie, depones, ‘ That she
“ recollects being employed in assisting in the
“ doctor’s house on an afternoon some time after
“ this period, and seeing Dr. Macneill and the
“ Pursuer and Defender come into the house
“ together, from Edinburgh, and go into the
“ dining room, which is down stairs, and that
“ she recollects of Mr. Jollie calling at the house
“ while they were in the dining room. Depones,
“ that she opened the door to him, and that he
“ walked up stairs, but whether he previously
“ took off his shoes or not she cannot positively
“ say, but that she thinks he did. Depones, that
“ she is certain he did not go into the room
“ where Dr. Macneill and the parties were, but
“ went up stairs, as deposed to; that she does not
“ know how long he remained in the house, as she
“ did not see him again. Interrogated, depones,
“ that she recollects of going into the dining
“ room, soon after Dr. Macneill and the parties
“ had gone into it, to inform them that the kettle

" was ready for tea, and that she recollects of
 " addressing the Defender by the name of Mrs.
 " Jollie; that the Defender seemed very much
 " offended at the deponent for doing so, and ex-
 " claimed, in an angry tone, ' Mrs. Devil: ' that
 " nothing more passed at the moment, and the
 " deponent left the room. Interrogated, de-
 " pones, that a little after the Defender came
 " into the kitchen, where the deponent was, for
 " the tea kettle, and took it herself into the di-
 " ning room. Depones, that she said nothing
 " to the deponent, nor she to her, as to what
 " passed in the dining room, either when she
 " came into the kitchen or any time after. De-
 " pones, that she recollects the Pursuer coming
 " out of the dining room, on the evening deposed
 " to, some time after the deponent had left it;
 " and that he went up stairs, and called up Mar-
 " garet Craig, the housekeeper, and the depo-
 " nent, and asked them, whether it was possible
 " that the Defender was married to Mr. Jollie?
 " Interrogated, what answer they made to him?
 " depones, and answers, Margaret Craig told him
 " that it was not only possible that they were mar-
 " ried, but that it was proveable, for that she
 " herself had been present on the occasion. De-
 " pones, that the Pursuer seemed very sorry, after
 " receiving this information, and she recollects
 " his repeating the words, was it possible?"

It was alleged, but not proved, on the part of
 the Respondent, to account for the absence of
 Dr. Macneill from the second marriage at Edin-
 burgh, that he was debilitated both in mind and
 body by a habit of drinking; and it was said
 that the fact of his incapacity had been found

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by the verdict of a jury, upon issues directed in an action of reduction; but the proof was not brought forward in this cause.

For the Appellant, the following evidence was produced in the Appeal, and relied on:—

Dr. Robertson, after stating that he knew Dr. Macneill by sight, proceeds:—"Interrogated, if he was applied to in June 1816 to come to Dr. Macneill's house to marry Dr. Macneill's daughter to Mr. Jollie, and what answer he made? Depones and answers, I was applied to; and I answered that it was not convenient to go to Dr. Macneill's house; but if they would come to my house in the evening, I would see them there. Mr. Jollie was the person who applied to me at this time, and he shewed to me then a certificate of proclamation of banns, in the usual form, otherwise I would not have invited them to my house. Interrogated, if the parties came to the deponent's house in a coach, at the time appointed? Depones and answers, yes; they came about half past seven that evening, which I think was the 13th of June, 1816. Interrogated, Who were the parties that came in the coach? Depones and answers, I was standing at my own window when the coach arrived; and Mr. Jollie was the first person who stepped out of it; he then handed out Dr. Macneill, and was followed by Miss Macneill, and some of the domestics; and the witness added, Dr. Macneill walked up the first flight of steps, amounting to ten, in my sight, with his arm in Mr. Jollie's, without any apparent difficulty; and when they were all assembled in the dining

“ room, Mrs. Robertson came and told me, and I
 “ went in to them. Interrogated, if Dr. Macneill
 “ made any observation previous to the marriage
 “ ceremony, and what it was? Depones and
 “ answers, I found them seated; he immediately
 “ rose slowly, and hoped I would excuse an old
 “ man, who, by reason of some infirmities, was
 “ unable to rise so readily, and make so polite a bow
 “ as he was accustomed to do in his younger days.
 “ Interrogated, What then took place? Depones
 “ and answers, I requested him to be again seated;
 “ he replied—No; I have come to give away my
 “ daughter to Mr. Jollie, and I must do so in the
 “ usual manner; on which he stepped forward,
 “ took her by the hand, and placed her near
 “ Mr. Jollie. Immediately thereafter I offered
 “ up a prayer, gave the parties a few exhortations,
 “ concluded with thanksgiving, in all which Dr.
 “ Macneill seemed to be much interested; for he
 “ requested them to remember the exhortation,
 “ and to act accordingly. When I found him so
 “ disposed, I said, I hoped he would be kind to
 “ the young people; to which he replied, Sir, I
 “ have been kind to them. I will be kind to
 “ them still; and nothing shall be wanting on my
 “ part to make them happy. I distinctly re-
 “ member the expression. I then certified the
 “ marriage on the lines of proclamation, and my
 “ constant form of words are, ‘the above de-
 “ signed parties were married before witnesses,
 “ ‘by James Robertson, minister.’ I then
 “ wished the parties much joy, and they left the
 “ room as they entered, Dr. Macneill in Mr. Jol-
 “ lie’s arm, and the rest followed. Interrogated
 “ for the Pursuer, if he was acquainted with Mr.

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“ Jollie previous to the marriage? depones and
“ answers, I was not personally acquainted with
“ him previous to his marriage; nor, to my know-
“ ledge, had I ever seen him, except in church,
“ as he was a member of my congregation; and
“ I knew there was such a person, though he did
“ not visit my house, and I heard he was a suitor
“ of Miss Macneill’s. Interrogated, if he recol-
“ lects from whom he heard that Mr. Jollie was
“ to be married to Miss Macneill? depones and
“ answers, no, I do not recollect it, but it was the
“ general report of the parish at that time.”

Afterwards, being “ interrogated, who he gave
“ the certificate of marriage to? depones and
“ answers, I gave it to the bride, as I always do.
“ Interrogated, in what form he asked the par-
“ ties if they were willing to be married? depones
“ and answers, I said to Mr. Jollie, do you take
“ this woman, (they having joined hands) whom
“ you have by the hand, to be your lawful mar-
“ ried wife; and do you promise, before God and
“ these witnesses, to be a faithful and a loving
“ husband to her, till God shall separate you
“ by death? Mr. Jollie replied, I do. I then
“ said to the bride, do you take this man whom
“ you have by the hand, to be your lawful mar-
“ ried husband; and do you promise to be a faith-
“ ful, a loving, and a dutiful wife to him, till God
“ shall separate you by death? And the conclu-
“ sion then is,—before these witnesses I declare
“ you married persons; and whom God, in his
“ good providence, has thus united, let no man
“ put asunder.”

Mrs. Robertson depones, “ I recollect the mar-
“ riage perfectly, but I cannot say exactly as to

“ the date; but I have no doubt but it was about
“ that time, (June 1816). Interrogated, if the parties
“ came to their house in a coach? depones,
“ and answers, yes they did. Interrogated, who
“ accompanied them? depones and answers, Dr.
“ Macneill was of the party, and a person who I
“ understand was housekeeper to Dr. Macneill;
“ and there was a bridegroom man, but I do not
“ recollect his name. Interrogated, if, at the
“ ceremony, Dr. Macneill gave away his daughter?
“ depones and answers, yes, he did. Inter-
“ rogated, if any conversation took place between
“ Dr. Robertson and Dr. Macneill before or after
“ the marriage ceremony? depones and answers,
“ yes, a good deal. When Dr. Robertson came
“ into the room, Dr. Macneill attempted to get
“ up from the sofa, which he did with great diffi-
“ culty, and said very politely, he hoped Dr.
“ Robertson would forgive the infirmities of an
“ old man; on which Dr. Robertson went for-
“ ward and took him by the hand, and said he
“ was glad he was giving his countenance to the
“ young couple, as he knew it was in his power
“ to be of use to them; to which Dr. Macneill
“ replied, he did so with all his heart, as he had
“ already done something for them, and he in-
“ tended still to do more. Dr. Robertson told
“ Dr. Macneill that he might sit during the cere-
“ mony. Dr. Macneill replied, that he had come
“ for the purpose of giving away his daughter,
“ and he would do it. Interrogated, if Dr. Mac-
“ neill wished Mr. and Mrs. Jollie much happi-
“ ness after the ceremony was over? depones and
“ answers, yes, he did so with great affection.
“ Interrogated, if the parties then went away?

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“depones and answers, yes, after getting the marriage lines signed.”

Christian Robertson (one of the Respondent's witnesses) says, “I nursed the Defender, (Appellant) and have been acquainted with her, and occasionally at her father's house ever since. Interrogated, depones, that she went to the west country with her father in spring 1816. After they came back, I am not sure but she said to me that Mr. Macgregor, the pursuer (Respondent) had been with her there. She said nothing to me about her marriage, or marrying. Mr. Macgregor told me he had been with them in the west country. I asked him if he was going to be married to the defender? (Appellant) He said, no; Dr. Macneill says he thinks I will be the man; but I think it will be Mr. Jollie, for I know her pre-engagement to him.”

John Carr says, “that he has been intimately acquainted with the pursuer (Respondent) for thirty years and upwards. Depones, that he recollects some time about April 1816, of walking down Leith Walk towards Leith, in company with the pursuer, (Respondent,) and John Manderson, a witness cited for the defender, (Appellant); and upon returning back again, they met, towards the head of Leith Walk, Mr. Jollie and the defender. Depones, that the pursuer stopped and had some conversation with the defender and Mr. Jollie; and upon his joining the deponent and Manderson, the deponent asked him if Mr. Jollie and the defender were married, to which he replied, that they were not married, but that they would shortly be so.”

John Manderson depones, "That he has been acquainted with the pursuer, though not very intimately, for, as he thinks, about five years. Depones, that he recollects going down Leith Walk one afternoon, with the pursuer and John Carr, the preceding witness, some years ago; the deponent cannot exactly say how long, when, either in returning or going down the Walk, they met the defender and Mr. Jollie. Depones, that the pursuer stopt to speak to them, when John Carr and the deponent preceded. Depones, that the pursuer afterwards rejoined the deponent and John Carr, and the latter put a question to him respecting the defender and Mr. Jollie; to which question the pursuer made some answer respecting a marriage that was to take place, as he thinks, between the defender and Mr. Jollie. Depones; that this circumstance happened so long ago; that the deponent has a very indistinct recollection of what the pursuer said upon that occasion; but he rather thinks he mentioned the intended marriage above alluded to was to take place in a short time."

Margaret Robertson depones, "that she heard her mother ask the Respondent, whether the Appellant was to be married to him or Mr. Jollie? When he answered, that Dr. Macneill believed that he (the Respondent) was the person to whom his daughter was to be married; but that he (the Pursuer) knew Mr. Jollie was to be the man, as the defender had entered into a pre-engagement with him."

Mrs. Macnoughton, Margaret Robertson's sister swears to the same fact, namely, the Respond-

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ent's statement, "that Mr. Jollie would be the
"man, as he (the pursuer) knew of his pre-
"engagement with the defender."

William Allan depones, "that he never heard
"any report that the pursuer and defender had
"been married till the month of March last,
"(1818) when he heard it from the pursuer him-
"self."

John Carr, after mentioning what had occurred
in April, 1816, when the Respondent declared
that Mr. Jollie was to be the husband of the Ap-
pellant, goes on to depone, "That about six or
"seven weeks after this," (which could not be
above a week or two after the marriage,) "the
"deponent happened to be in the shop of a Miss
"George, in the Kirkgate of Leith. Depones,
"that Miss George then mentioned to the depo-
"nent that Mr. Jollie and the defender had been
"married by Dr. Robertson, minister of South
"Leith. Depones, that the first time the depo-
"nent saw the pursuer, he put it to him whether
"this was the case or not; and the pursuer inti-
"mated to the deponent that it really was so.
"Interrogated, whether the defender had ever
"shewed the deponent the gloves which he said
"he had received on occasion of the marriage of
"the defender and Mr. Jollie? depones, that he
"cannot charge his memory whether the pursuer
"did so or not; but he recollects seeing the pur-
"suer have a pair of new gloves, which, accord-
"ing to the best of the deponent's recollection,
"he told him were the gloves he received on the
"occasion of the marriage. Interrogated, de-
"pones, that the deponent and Mr. Macgregor
"sat in the same pew in the chapel of ease, and

“ that subsequent to the period which has been
 “ alluded to, Mr. Jollie and the defender were in
 “ the practice of occasionally coming to sit in
 “ the same pew, as visitors of Mr. Macgregor.
 “ Depones, that he never knew Mr. Macgregor to
 “ come along with Mr. Jollie and the defender to
 “ the seat, but Mr. Macgregor was generally in
 “ it before they came. Depones, that after the
 “ service was over, the pursuer always walked
 “ away in company with the defender and Mr.
 “ Jollie. Depones, that upon one occasion, se-
 “ veral months after Dr. Macneill’s death, the
 “ deponent recollects of being in Mr. Jollie’s
 “ house to tea, along with a number of other per-
 “ sons, and among the rest the pursuer. De-
 “ pones, that upon this occasion the deponent
 “ recollects that wine and spirits were brought
 “ in, and the health of Mr. and Mrs. Jollie was
 “ drank by the company, the pursuer being pre-
 “ sent? but the deponent cannot exactly say that
 “ the pursuer personally drank their healths. In-
 “ terrogated for the pursuer, whether he can say
 “ how often the defender and Mr. Jollie came to
 “ the chapel of ease, as above deposed to; and
 “ whether it was twice or thrice he saw them
 “ there? depones, that he cannot exactly say how
 “ often, but he is certain that he has seen them
 “ there at least a dozen of times.”

Margaret Craig depones, “ That she was in the
 “ service of the late Dr. Macneill, in the capacity
 “ of housekeeper, from Martinmas 1807, to Mar-
 “ tinmas 1816. Depones, that she repeatedly
 “ saw the pursuer in the doctor’s house, from
 “ July 1815, when the defender came to the
 “ house, till the deponent left the service; and

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“ after the defender became Mrs. Jollie, which
 “ was on the 13th June, 1816, the deponent has
 “ seen him repeatedly there at dinner and tea,
 “ both in the drawing-room, and in the dining-
 “ room or parlour. Depones, that they dined
 “ several times in the drawing-room, to avoid
 “ disturbing the doctor. Depones, that upon
 “ these occasions she has heard the pursuer drink
 “ repeatedly to the defender and Mr. Jollie,
 “ by the names of Mr. and Mrs. Jollie; and the
 “ deponent recollects, on repeated occasions, of
 “ the pursuer asking the deponent, when he
 “ called at any time at the door, how Mr. and
 “ Mrs. Jollie did, after asking for Dr. Macneill.
 “ Depones, that she cannot recollect whether the
 “ deponent’s husband was present on these occa-
 “ sions, when the pursuer drank to the defender
 “ by the name of Mrs. Jollie, but that nobody
 “ else was present. Depones, that Mr. Jollie
 “ always stayed in Dr. Macneill’s house after the
 “ defender’s marriage with Mr. Jollie.”

William Allan, being interrogated, “ Whether
 “ it consists with his knowledge that the pursuer
 “ acknowledged the defender and Mr. Jollie as
 “ married persons after their marriage? depones,
 “ that he has heard the pursuer, on various occa-
 “ sions, drink to them as married persons, be-
 “ twixt the time of their marriage in June 1816
 “ and the October following, when the deponent
 “ went to sea. Depones, that the pursuer has
 “ dined different times during that period in
 “ Dr. Macneill’s house, and the deponent dis-
 “ tinctly recollects of the pursuer drinking to
 “ them both as married persons.” He then goes
 on to mention a party in which the Respondent

drank the Appellant's health as Mrs. Jollie. Afterwards, upon cross-interrogation, he depones, "That the defender's marriage with Mr. Jollie took place in the month of June 1816, and the deponent was present at the marriage. Depones, that he, the deponent, dined with the defender and Mr. Jollie in Dr. Macneill's parlour on these occasions, when he heard the pursuer drink to the defender and her husband by the name of Mr. and Mrs. Jollie; that he does not recollect whether Dr. Macneill was present on all these occasions that the deponent dined there, nor can he say whether he was present on any of the occasions when the pursuer drank to the defender by the name of Mrs. Jollie."

James Shank, tenant in Stevenston, after saying that he recollects the visit of October 18, 1816, when he paid Dr. Macneill a small sum of feu-duty, "Depones, that upon the above occasion, there were some spirits brought in, and the deponent recollects, that upon one occasion at least he heard the pursuer (Respondent) drink to the health of the defender (Appellant) under the appellation of Mrs. Jollie. Depones, that he, the deponent, repeatedly, at this time, addressed himself to the defender by the name of Mrs. Jollie, in presence of the pursuer, and without his objecting to it."

William Adie, with reference to the same visit, and to a settlement which took place between him and Dr. Macneill, as to certain deductions to be made from the witness's rent, swears, "That the pursuer wrote the settlement which then took place. Interrogated, depones, that after

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“the above-mentioned settlement was agreed upon, there were some spirits brought in, and the deponent himself, in drinking to the health of the defender, addressed her by the name of Mrs. Jollie, without any objection being made to her receiving that title on the part of the pursuer, who was present. Depones further, that to the best of his recollection, the pursuer also, in drinking to the health of the defender, gave her the appellation of Mrs. Jollie.”

Mary Hastie, daughter of the inn-keeper at Holytown, depones, “that in October, 1816, Dr. Macneill, the Respondent, and the Appellant, and Mr. Jollie, remained two nights at the inn. That she, the deponent, then served at table to the party, and she recollects of hearing the pursuer recognise the defender as Mrs. Jollie, and drink to her health as such, and this he did during all the time they remained in the house. That during the two days they were at Holytown, as above deposed to, Mr. Jollie, the defender, and the pursuer, all slept in the same bed room at night, as it was a double bedded room; in one of the beds of which Mr. Jollie and the defender slept together, and, in the other, Mr. Macgregor, the pursuer, there being no further accommodation in the house. Interrogated for the pursuer, depones, that she judged that Mr. Jollie and the defender slept in the same bed, as above deposed to, from the circumstance of Mr. Jollie asking of the witness a bed for himself and Mrs. Jollie. Depones, that they all went at the same time into the bed room; and the deponent was not in the room till next morning, after the gentle-

"men had left it; and she went in and saw Mrs. Jollie."

Mrs. Margaret Miller depones, that she was in Dr. Macneill's house on the day of the funeral, when there were various persons present: "That the whole company, including the pursuer (Respondent) considered Mr. Jollie and the defender (Appellant) as the master and mistress of the house, and their healths were drank to as such. That upon this occasion, she repeatedly heard the pursuer, Mr. Macgregor, drink to the health of the defender as Mrs. Jollie, and she is perfectly certain of this fact. That she was also present in Dr. Macneill's house the day before the funeral. That the pursuer was there at the same time, and he went out alone with the deponent. That on this occasion, the deponent put the question to the pursuer, who it was that married Mr. and Mrs. Jollie? to which the pursuer answered, that it was Dr. Robertson, minister of South Leith; and the pursuer at the same time mentioned that he was personally present at the ceremony. That she, the deponent, after the funeral of Dr. Macneill, frequently visited in the house of Mr. and Mrs. Jollie, in which, on two several occasions she met with the pursuer; on both of which he recognised the defender as Mrs. Jollie. Depones, that indeed, upon many other occasions, when the deponent happened to meet him, the pursuer recognised the defender to the deponent as the wife of Mr. Jollie."

Mrs. Littlejohn states, that she was present on the day of the funeral; that the Respondent was

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there, and that he appeared "to conduct himself
 "entirely as a guest of Mr. and Mrs. Jollie, in
 "the same manner as the rest of the persons pre-
 "sent did, only he did not appear so forward as
 "some of them; and as to drinking the defender's
 "health as Mrs. Jollie, the deponent thinks he
 "just 'did as the rest." Afterwards, being in-
 "terrogated, "If she recollects who it was that
 "first congratulated the defender, as above de-
 "poned to, as the lady of Stevenston? Depones,
 "that she recollects of Mr. Macgregor doing so
 "when he first came into the room."

Christian Menzies swears, that she had seen and
 heard the Respondent over and over again recog-
 nise Mr. and Mrs. Jollie as man and wife. "That
 "Mr. Macgregor was very much in the house at
 "the time Dr. Macneill died, and seemed to take
 "a charge in advising Mr. Jollie to make arrange-
 "ments for the funeral. That, at this time, Mr.
 "and Mrs. Jollie invariably appeared as master
 "and mistress of the family; and the pursuer
 "was considered in the light of a visitor there
 "merely. That upon the first Sunday after Dr.
 "Macneill's death, the defender and Mr. Jollie
 "were kirked in the chapel of ease; upon which
 "occasion the pursuer accompanied them, both
 "going on foot, and upon their return in a hack-
 "ney coach; and he also dined with them upon
 "the same day."

Mrs. Margaret Cunningham, "depones, that
 "she was present in Dr. Macneill's house two
 "days previous to his funeral, and the pursuer,
 "Mr. Macgregor, was also present. That Mr.
 "Jollie and the defender were present on the
 "same occasion. That, on this occasion, a glass

“ of wine was handed about to the company, and
 “ the deponent distinctly heard the pursuer then
 “ drink to the defender and Mr. Jollie, under the
 “ appellation of Mr. and Mrs. Jollie, and then
 “ afterwards he drank to the health of the rest of
 “ the company. That the evening before the
 “ funeral, the deponent was again present at the
 “ chesting of Dr. Macneill, at which time the
 “ pursuer was present, and wished to make him-
 “ self serviceable to Mr. Jollie and the defender,
 “ whom he invariably recognised as Mr. and Mrs.
 “ Jollie, and made an apology to them for being
 “ obliged to go away sooner than he could have
 “ wished.”

Thomas Littlejohn depones, “ that he was at
 “ Dr. Macneill’s funeral in May 1817, and that
 “ he afterwards went, along with several other
 “ persons, among whom was the pursuer and Mr.
 “ Jollie, to the house of Mr. James Smyth, W. S.
 “ when he heard Dr. Macneill’s deeds of settle-
 “ ment read over. That, on the same evening,
 “ the deponent went down to Dr. Macneill’s
 “ house, where he saw the pursuer in company
 “ with the defender; and Mrs. Littlejohn, the
 “ deponent’s wife, and Mr. Jollie were also pre-
 “ sent.”

Benjamin Brown, surgeon in Edinburgh,
 swears, “ that he recollects sometime in the
 “ month of October 1817, three years ago, of
 “ he, the deponent, and his wife, Mrs. Brown,
 “ being at the house of Mr. Jollie, the defender,
 “ when the pursuer was present.” He depones,
 “ that upon this occasion, there were several
 “ other persons present. That it was the first
 “ time, so far as he can remember, that he had

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“ visited Mr. Jollie and the defender ; and as
 “ was the common practice on such occasions,
 “ the deponent has no hesitation in saying, that
 “ the company, in general, drank to the health
 “ of Mr. Jollie and the defender, as married per-
 “ sons.” Hector Gavin adds, “ that he, the depo-
 “ nent, sat next to the pursuer on the occasion
 “ alluded to ; and although he is not certain, yet
 “ he thinks that the pursuer must have, along with
 “ the rest of the company, drank to the health of
 “ Mr. Jollie and the defender, as married persons,
 “ otherwise he thinks his conduct must have been
 “ taken notice of.”

On advising the proof and memorials, the Com-
 missaries, in June 1821, found, “ that the Pursuer
 “ had established by sufficient evidence that a
 “ marriage was celebrated betwixt the Defender
 “ and him, by Joseph Robertson, late, &c. in the
 “ month of May 1816; that the Defender has
 “ failed to establish by evidence any circumstance
 “ sufficient to elide the legal presumption thence
 “ arising, of matrimonial consent having been
 “ duly adhibited by her on that occasion; and
 “ therefore found facts, circumstances and quali-
 “ fications proven relevant to infer marriage be-
 “ tween the parties, and declared them married
 “ persons accordingly and decerned.” Upon ad-
 vising a reclaiming petition in 1821, the Com-
 missaries adhered to their former judgment, and
 found that “ no circumstances had been attempted
 “ to be proved on the part of the Defender, from
 “ which to infer intimidation, as avowed by her;
 “ that the Defender’s matrimonial consent, arising
 “ from the marriage ceremony at Robertson’s, is
 “ strengthened by the Defender’s admission, that

“ the Pursuer accompanied her back from Robertson’s to her father’s house on the same evening, and that a presumption thence arises of sexual intercourse having followed betwixt the parties, which is farther confirmed by what passed at White’s, the lapidary, some time thereafter; and that the inference of the Defender’s matrimonial consent is not contradicted by any part of the Pursuer’s conduct immediately following the marriage ceremony; and that although his conduct, at a subsequent period, might infer his willingness to relinquish his legal claim to the Defender as his wife, such conduct cannot destroy the legal effect of the evidence adduced to establish the validity of the previous union of the parties.”

Against this judgment a bill of advocacy was presented, upon which the majority of the Court was of opinion that the case should be remitted for farther proof, which was accordingly taken as to the marriage of Jollie, and the circumstances of the conduct of Macgregor after the marriage, and his possession of the title deeds.

Upon advising this additional proof, the Commissaries were equally divided, and accordingly, by the practice of the Court, the judgment was affirmed. They found the marriage established, and decerned in the terms of the libel.

The Respondent thereupon brought the case again under the review of the Court of Session.

On the 23rd of December, 1825, the Court adhered to the former judgment.*

* While this cause was pending, Macgregor presented a petition, praying for a sequestration of the heritable and moveable property of Mrs. Macneill, *alias* Jollie. In this and another

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Against these judgments the Appeal was presented.

The appeal was heard on the 14th of June, in the session of 1827, when an objection being suggested for want of parties, it was moved, that the hearing should be postponed, in order that inquiry might be made whether, according to the practice of the Consistorial Court in Scotland, Mr. Jollie and the children should not be parties.

Upon that occasion *Lord Eldon* said, that this objection for want of parties was not raised in the papers, or in the arguments in the Court below; that it was a new question raised for the first time before the House, which made the House a Court of original Jurisdiction; that it was on this ground, that he had been in the practice of remitting cases, where new questions, not argued below, had been raised before the House: that in later years, considering that this course led to great delay and expense, he had discontinued the practice of remitting causes, and decided questions raised originally before the House; but that this state of things should not be permitted to exist, but should be remedied by a standing order of the House.

Lord Redesdale said it was the business of Courts not to consider the convenience of parties, but of the general administration of justice; that public convenience should be considered, rather than that of the parties to the suit; so

proceeding Jollie appeared. But no application had been made in the principal action to have Mr. Jollie or the children heard for their interests. Nor had they in that action been sisted as parties.

that it might be known to every body what is the law, and in what manner it is to be administered in Courts of justice; that parties should be held strictly to the rules of the House, and expense to them should not be saved by the public sacrifice, which must be the consequence of irregularity and uncertainty. He then proceeded to say that it was important to know what were the points in dispute between the parties; that in Scotch cases it was the habit to display an argument; that the printed case should be a simple statement of facts, and application of the law arising out of the facts; but in this case it was a printed oration, instead of a plain statement of facts, and the House was left to find out the case.

Lord Eldon further observed, that it was true, other persons deeply interested in the decision, as the case now stood, had no opportunity of being heard; but if it had been the practice of the Consistorial Courts in Scotland to proceed without such parties, he should hesitate to advise the introduction of a new practice, which might affect the judgment of those Courts in former cases. He therefore advised that cases should be laid on the table, and counsel heard upon this question of practice.

On the 29th of February, 1828, the question as to parties and the practice was argued.—

It was contended on behalf of the Appellants, that in former cases, where a second husband or wife, or children, were not called, the fact might not have been known, but here it was notorious; that in questions of pecuniary interest, it was always deemed necessary that a person to be affected by the judgment should be a party to the

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suit: How much more was it necessary where parties were to be deprived of such valuable rights, as the *status* of husband and children? As to the right to intervene, it proved the necessity; and a party intervening after the commencement of a suit, does so to a disadvantage. Is Mr. Jollie to adopt the admissions of Mrs. Jollie, and be bound by them? It was farther contended, that the second marriage should have been stated in the pleadings.

For the Respondent it was argued, that in cases of marriage it is the practice of the Courts to require only that the principal party should be called, unless collusion is suggested; that in the Dalrymple case,* the suit proceeded to a certain length, and the original decision was given without the presence of Laura Manners, a party interested; she came in afterwards upon the appeal. Suppose the children of a second marriage were in a foreign country, must the *status* remain in suspense for ever, or till what time? that Jollie had attended the proceedings, and could not complain of want of notice; that it would have been superfluous to state the second marriage in the pleadings, since a valid marriage could not be nullified but by a competent court.

On the question of parties, the following authorities were cited:—

For the Appellant—Stair App. 792; 4 Ersk. 1. 66; Campbell, *Dict.* 10456; Pennycuick and Grinton, *Dict.* 12677; 4 Stair, 45. 20; 1 Ersk. 6. 49; Craig, 2. 18; Phill. Evid. 2. 239.

A great number of precedents were also produced from the Records of the Commissary Court,

in which persons affected by the judgment were not called as parties.

For the Respondent—*Greenhill v. Aitken*, 16th June, 1824; MSS. Cases in D. P.; Chapman and Lindsay, 23rd Feb. 1826, (4 Shaw and Dunlop, No. 320); Dalziel, *Dict.* 16780; Hargrave's Law Tracts; Case of Duchess of Queensberry; Scaccia de Sententiis; Heraldus de Rebus Judicatis; Mauritius de jure interventionis; Case of Dalrymple, Hagg. Rep. 2. 54.

Lord Eldon observed, that if according to practice Jollie might sist himself a party in the Court of Session at any time, he might do so perhaps in the House, as they were sitting as a Court of Session; and as to the question, whether he must adopt, and be bound by the proceedings as they stood, he must be heard on that point, before such a question could be decided. But that there was a difficulty as to the children, because the House could not appoint curators, and the cause must go back to the Court below for that purpose; and he doubted whether the House could permit Jollie, or the children, to intervene originally in that, the Court of Appeal; that the cause, if necessary, must be remitted for the purpose.

The case then, upon *Lord Eldon's* motion, was ordered to stand over for a week.

The case was again heard on the 7th of March, when the following observations were made by—

Lord Eldon—When this cause was heard at your Lordships' bar, in consequence of what passed in a previous session of Parliament, your Lordships were pleased to direct that counsel should be heard

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on the question, whether the cause could be decided without bringing other parties before the house, who appeared to be interested in opposing the case of the Pursuer in this action. I am extremely glad that your Lordships were pleased to permit the matter to stand over, with a view that the question, whether there were sufficient parties before the House might be fully considered, before you ventured to say that you would not hear the cause upon its merits. First, because it is of very great consequence that the general doctrine in cases of this sort, with respect to who should be parties to a suit, should not be disturbed by what is done in this House. In the next place, because if it was necessary that those persons who have been mentioned, viz. Jollie one of the husbands, (if I may so describe him) and the children of Mrs. Jollie, probably by that Mr. Jollie, or who perhaps may have a claim now to say that they are the children of Macgregor, should be before the House, as parties, it is important that they should be made parties to the suit, before you enter upon the question of the merits.

This is not a mere action of declarator, unless the prayer with which the summons concludes, is the ordinary prayer in an action of declarator of marriage; and I mention that, because it does appear to me to be a matter of very great importance, that when the question is discussed upon its merits, some attention should be given to the prayer of this summons. It is not merely a prayer that it might be declared that Mary Macneill, sometimes called Mary Black Macneill, and Malcolm Macgregor, are lawful married persons,

husband and wife of each other; but it likewise prays, that the Court would decern and ordain the Defender, to adhere to and cohabit with the Pursuer, and treat and entertain him in all respects as her husband; and one question which may probably deserve consideration, (I speak this entirely without prejudice) is this; whether it is competent for a man, supposing him to have acted with respect to this second marriage in the manner in which these printed cases state Macgregor to have acted, to come into Court, not merely for the purpose of having the marriage declared with respect to the civil consequences of the marriage, but to call upon that individual woman, with reference to whom he had so conducted himself, to return to him, and cohabit with him as a wife.

What would be the case here, if it were a suit for the restitution of conjugal rights, and the husband had so acted who instituted that suit, I do not pretend to say that I know; but it is a point that I should wish to hear something of at the bar of the House, before I can make up my mind. If the case is made out in point of fact, with respect to the conduct of this man, (admitting that if it were a suit for civil purposes, as for rents and profits, and so on, that the suit might be entertained to the extent of having it determined judicially, that he was the husband,) I do entertain very considerable doubt indeed, whether a man who makes a present of his wife, in the manner in which this gentleman is stated to have made a present of her to Mr. Jollie, has any right to come into any Court, for the express purpose of calling her back again to cohabit with

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him, and to act towards him as a dutiful wife ought to act to an affectionate husband.

With respect to the question of parties, your Lordships have heard from the bar, and have heard it very properly as well as very learnedly stated, what is the general rule with respect to making parties to such a suit as this. If you are disposed to say that you agree with the doctrine that the husband Jollie and the children should be made parties, yet I am sure that your Lordships will feel that it is not in your power originally to determine a point of that nature, but that it would be necessary to direct the cause to be remitted, in order that the question with respect to the rights of those parties might be fully considered and properly adjudicated.

On looking through the papers, I find that it is insisted, and has, in fact, been pronounced upon by the Court below, that Jollie is not a necessary party: that might, perhaps, fall under your Lordships' consideration as a matter of appeal. With respect to the children, their right to intervene, or rather the necessity, I should say, of having them as parties before the House, does not appear to have been considered at all in the Court below, but that would not relieve you from the necessity of sending the cause back again, if a point on their behalf is to be made with reference to the question whether they should be made parties or not: and really there is a most curious circumstance in this case, with regard to that point: for whatever might be the case with respect to children in other circumstances, I apprehend that *primâ facie* you have the right of those children now before the Court, because those children be-

ing *primâ facie* the children of her husband, if this person (Macgregor) is her husband, they are *primâ facie* his children, and until he is divested of the *primâ facie* character of the father, of those children he would be, in truth, their tutor, or the person to take care of their interests; and a singular distribution of parties it would be, if he had the *onus* of that duty laid upon him under such circumstances, for no one could suppose for a moment that it would be honestly discharged.

But whatever is the general doctrine with respect either to the necessity of having parties, or the rights of persons to intervene, it has been very properly admitted by the counsel that the general rule is, (as Dr. Lushington and another gentleman has remarked it to be,) that it is not necessary to have any parties but the parties principally interested; and there are many considerations of policy, with respect to marriage suits in particular, that may make it expedient not to depart from that rule, and it can hardly be denied that this rule is a rule familiar in many other cases besides matrimonial cases. In a Court in which I long sat, we all know that a suit may go on against an infant tenant in tail, and if that infant tenant in tail should happen to die, yet the proceedings had against him would be good against the remainder man when he came into existence, because the tenant in tail was the principal party interested when he was before the Court. It has not, on the other side, been denied that the husband may intervene if he pleases. It has not been denied that, in a special case, the Court may call on the parties to bring before it other parties than those admitted to be interested in

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the suit, and if that doctrine is to be applied only to special cases, it is quite clear that before we can say a word as to whether that applies to this case, we must be able, after hearing this case on its merits, to determine whether this is that special case in which we shall call for such an intervention as I have now alluded to.

Upon that ground, as well as upon the other grounds, it appears to me that it may be right to go on with the hearing of the case on its merits, for this appeal is brought before your Lordships under the sanction of very eminent counsel, as an appeal fit for you to hear; and I am sure I may say, without offence to any body, that if the intent of desiring counsel to sign appeals and other proceedings in Courts of Justice were fully attended to, I believe it would work as beneficial a change in the administration of the law as any whatever that can be mentioned. The suit being a proper suit to be heard upon appeal, it is quite clear that Mr. Macgregor, if your Lordships should happen to reverse the judgment, can have no reason to complain if you reverse it on the merits. It is a case, therefore, in which, in one view, and supposing the cause to come to one end, you may decide this matter, which it is agreed on all hands at the bar ought to be decided, without all the delay which must take place if you were to go through the operation of remitting it to the Court of Session, and then discuss it in the shape of a future appeal from the Court of Session, which may not take place for some years; and the final decision of this case might not be obtained till a great lapse of time shall have taken place, and these parties be kept

in the state of misery in which some of them must be at present.

There is another circumstance in this case, which it strikes me is a very material one, and I take the liberty of mentioning it, that the counsel may consider whether there is any thing in it, or rather I should say, in the papers before us, that may require much to be said upon it; and it is this—I observe that, in the Commissary Court, it is found that there are not proofs of circumstances sufficient to elide (I think is the expression) the intention of marriage. They apply that species of finding to a marriage which is said to be regular, and *in facie ecclesie*.

I observe too, there are a great many cases cited on both sides, with a view to bringing under discussion the question, whether a marriage cannot be attacked upon the ground of want of consent, the want of consent being made out by proof of force or fear? There is a great deal likewise to be found in the papers with reference to the question, whether evidence of circumstances may not be adduced, to shew that, notwithstanding the marriage was regular *in facie ecclesie*, and though you cannot attack it on the general ground either of force or fear, (the point is a very singular one—the point is a very important one in its decision one way or the other) whether it is not consistent with the law of Scotland, that even where there is no force or fear, there may yet be circumstances which shall give the parties a right to deny the intention of being married persons, though they went through the ceremony regularly? and I mention this, because I do not see how this House can either affirm or disaffirm

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the judgment of the Court below, without taking notice of some parts of the contents of the interlocutors which have been pronounced, bearing reference to that most important point.

Under these circumstances, therefore, it appears to me proper, humbly to advise your Lordships to call upon the counsel at the bar, if they are now prepared so to do, to go through the case upon its merits; or if they are not now prepared so to do, to mention some day on which it will be convenient for them to undertake to go through the merits, and I propose to your Lordships that that course should be adopted. My Lords, I would just mention that this is not an action of declarator concluding for a divorce, but it is an action of declarator by a person stated to have conducted himself in the manner I mentioned, concluding for what we should call a restitution of conjugal rights. Nor is it an action of declarator of any other species, where upon the proof of the marriage civil rights of property are to be enforced.

Upon this motion, it was ordered that the appeal should stand over for week.

On the 14th, 18th, 20th, and 25th of March, the case was argued upon the merits.

For the Appellant—It was argued, that the conduct of the parties, although it could not annul a regular marriage, was evidence that there was no serious consent in a solemnization which was not in all respects regular, and the following authorities were cited: *Campbell v. Cochrane*, D. P. 31st Jan. 1753; 1 Ersk. 6. 10; 1 Bank. 5. 23; *Cameron Dict.* 12680; *Allan*, 11th Aug. 1773; *McInnes*,

Dict. 12683; Taylor, *Dict.* 12687; McLauchlan, *Dict.* 12693; McGregor, *Dict.* 12697; Napier, (see the case of Dalrymple) *Sanctius de Matrimonio*; Haggard's Rep. 2. 280; Hailes; Tait on Evidence; Forbes, *Dict.* 16718; Murray, *Dict.* 16741.

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For the Respondent—It was contended that the marriage being regular *in facie ecclesiæ*, consent was necessarily implied in the act itself, and could not be controverted by circumstances of conduct as evidence of the want of consent. The authorities were: 1 Ersk. 6. 10; McInnes *quâ supra*; Taylor *q. s.*; McLauchlan *q. s.*; McGregor *q. s.*; Napier, *q. s.*; McKenzie, F. C. 8th March, 1810; Niven, Fount. 1. 501; Tait on Evid.; Barber, *Dict.* 16742; Young, Id. 16743; Hailes' Canon; Hume on Crimes, 1. 462. 2. 329; Mogg, Addam's Rep. 2; Fletcher, Coxe's Rep.; Hailes' Rep. 1. 561; Elchies No. 7. Voce Proof.

In the course of this argument, Lord Eldon enquired whether the words, "and decern," in the interlocutor of the Commissaries, were applicable to the whole of the conclusions of the summons; and observed, that if the interlocutor of the Court of Session was to be understood as not having yet determined the question of adherence, it could not be discussed in the House as an original question for its judgment. He also observed that the question, whether the fact of consent could be controverted, was very important to be argued; that in the Dalrymple case it was not necessary to determine that question; that certain expressions in the interlocutor of the Commissaries in this case, and the judicial arguments in the Court of Session, led to the inference that evidence might be admitted on the question of consent,

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even if it were conceded that the marriage was regular. He also suggested an objection, that the judgment was for a good marriage at Edinburgh, while the summons alleged a good marriage at Holytown; that if the first was good, the second was only a form; that both could not be good, nor proof of a second valid marriage be properly given, upon a summons which alleged a prior valid marriage; that the question upon the first should have been disposed of by the judgment, that it might be consistent with the pleadings; that the evidence was inconsistent with the summons, for the certificate of banns was, that the parties were "free and unmarried;" that as there was no judgment on that part of the summons which alleged a marriage at Holytown, if the House should reverse the interlocutor, the Respondent might bring a new action, insisting upon the marriage at Holytown; that, in English pleading, if a declaration should allege a marriage in Scotland, and then, as in this case, that a marriage was celebrated in England, to make good the marriage in Scotland, proof of the marriage in Scotland would negative the allegation of the marriage in England.

At the conclusion of the argument, *Lord Eldon* said, that as to the objection raised by him, with respect to the proceeding upon a summons having two objects, he had been misled, by not having read the petition of appeal, which was regularly founded upon the provisions of the act of Parliament, which authorizes an appeal to the House after an interlocutor has been pronounced, which may have a material effect upon the ulterior pro-

ceedings in the Court below; but that there was nothing in the act which prevented the House from remitting the case to the Court below, with a direction that they should give a judgment upon the question of adherence.

The case was then adjourned for further consideration.

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On the 13th of May, 1828, the case was again brought on, when the following observations were made in moving the judgment.

Earl Lauderdale.—My Lords, this is an action of declarator of marriage, brought by Malcolm Macgregor, a man of very low birth, and of distinguished immorality of character, against Mary Black Macneill, the natural daughter of the Reverend Doctor Macneill, a clergyman, in respect of immorality of conduct, certainly worthy of sustaining the relation of father-in-law to the Pursuer, who by this declarator aims at the honour of becoming his son-in-law.

On the first interlocutor of the Commissaries, I only wish to call your attention at present to the circumstance, that the finding is completely different from the allegation in the summons and condescendence; for they allege that a regular marriage was celebrated at Edinburgh, to give form and effect to the private marriage which was alleged to have taken place at Holytown.

Now, before calling your attention to the particular grounds upon which I shall humbly offer to your Lordships my reasons for thinking that those interlocutors ought not to be affirmed, I wish to call your Lordships' attention shortly to the outline of this case.

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It appears that this Mr. Macgregor was married to the step-daughter of a woman of the name of Christian Robertson, to whom Miss Mary Black Macneill was given in charge to be nursed; from that time, though she returned again to her mother's house, with whom she lived to the age of twenty-three, Miss Mary Black Macneill seems to have frequented principally the society of Mrs. Christian Robertson; her step-daughter, the wife of Mr. Macgregor; of another daughter, Margaret Robertson; a type-founder of the name of Macnaughton, and his wife, another daughter of Christian Robertson; and, lastly, of a cousin named Janet Nicholson, by whom it appears that Mr. Macgregor, after the death of his first wife, the daughter of Christian Robertson, had two natural children, if indeed there is not evidence in the case that he was married to her; because your Lordships will find that, in the course of the examination of this Janet Nicholson, though she asserts broadly that she never had confessed it, either to Mr. Jollie, or to Mary Black Macneill, and though she is asked by the examiner whether she ever confessed it to any body else? the examiner has carefully abstained from putting the question direct, whether she actually was married.

In such society, your Lordships cannot suppose that this unfortunate woman got any very distinguished education, or that she could contract habits other than those which were calculated to debase her mind; but, in the mean time, it appears that this man, Mr. Macgregor, who must have been a man of considerable art and cunning, though of low birth and station, had

got such an influence over the mind of Dr. Macneill, that in the end of the year 1815, when the mother of Miss Mary Black Macneill died, we find him boasting that he had used his influence to get Mary Black Macneill acknowledged by her father, and taken into his house. What his object was in so doing, I think I shall convince you, for I think I will make it impossible for your Lordships to doubt that he at this early period laid the project, through the influence he had gained over the mind of Dr. Macneill, of getting to himself Dr. Macneill's property, through the medium of the hand of this natural daughter.

In pursuance of this design, your Lordships will find that, by Dr. Macneill's direction, sometime about the middle of April, 1816, he managed to get a deed executed, which gave to Mary Black Macneill the house which Dr. Macneill inhabited, and 500*l.* of money; and, on the 1st of May following, Mr. Macgregor got him to execute a deed, which conveyed to Mary Black Macneill, by disposition *mortis causa*, his whole landed property lying in Lanarkshire, in the neighbourhood of Holytown.

It was not long before Mr. Macgregor took steps to follow out the design which he had thus early formed, for, in the middle of May, it appears that he went with Dr. Macneill and his daughter, for the purpose of giving his advice concerning the management of the property near Holytown, and it is alleged, that there the irregular marriage, stated in the summons, took place. How it was irregular, when compared with the marriage subsequently contracted at

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Edinburgh, it is very difficult to discover, because, in neither was there a proclamation of banns, and that marriage was celebrated before a clergyman of the church of Scotland, as well as the other, and I believe the most immoral clergyman, with the exception of Mr. Joseph Robertson, that possibly could have been picked out from the members of that church.

Mr. Macgregor states, that he returned to Edinburgh with the family, on the 20th of May, 1816, and that the parties there formed the design of celebrating regularly the marriage, which had been irregularly contracted at Holytown.

Now, whether the parties were or were not conscious that upon this occasion they had contracted marriage, I shall, in stating the facts of this case, submit to you my opinion subsequently, but, in the mean time, it is sufficient to say, that there is not in the whole mass of evidence any proof whatever that, from the moment that that alleged marriage was contracted, either of the parties acted as if they had actually thought they had been married persons. I know very well that the Commissaries have stated, that the inference of the Defender's matrimonial consent is not contradicted by any part of the Pursuer's conduct immediately following the marriage ceremony. I think there is direct evidence that immediately following the marriage ceremony there was such contradictory conduct, because there is an admission in the action of the sequestration by this very Mr. Macgregor, that he saw Mr. Jollie and Mrs. Jollie together within a few days of the marriage. Within a few days of what

marriage? The marriage that he charges, is the marriage that he says took place at Holytown, and if you are to take it to have been to within a few days of that, it becomes a doubt with me, whether it was before or after the alleged celebration of this marriage at Edinburgh, that this meeting took place in Pekrig Street, when Mr. Macgregor puts it beyond all controversy that he never behaved subsequently as if he had been a married man; because, he states that from that hour he abandoned her, and formed an idea that he would get a divorce. Thus, it is clear, that even at that early period, he did not conduct himself in such a manner as to shew that he was conscious in his own mind that he was married. On the other hand, it is certain that the lady from the very first conducted herself in a manner that shewed that she had not the most distant idea that she was married, as sufficiently appears from her having married within a very few days another man, with the consent of her father.

If you look at the general outline of this case, you will see that Mr. Macgregor, having placed himself, as he thought, in such a situation that he might assert his right, if it turned out that this woman really possessed her father's fortune, and that he might abandon her if it turned out otherwise, (for that seems to have been the object of his attempt) abstained from doing any thing to assert this right, till he saw her married to another man, till he saw children born of that marriage; and he then comes forward (thinking that she was then secured in the possession of the property, and overlooking the scandalous nature of the attempt) to deprive an innocent man of the

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wife, to whom he thought he was really married ; overlooking also the scandalous nature of the attempt to transfer to himself, as his legitimate children, the children of another ; or perhaps rather with the view to found some future proceedings, with a view to illegitimatize those very children, and deprive them of their birth-right. I think your Lordships will perceive, that a more scandalous case never was brought before any court of justice.

Your Lordships must recollect that last year there was a case discussed at your bar—I mean that of a Miss Turner and Mr. Wakefield ; compare the circumstances of that case with this case. It is very true that Mr. Wakefield seemed to have formed a scandalous plan to possess himself of that young lady's property, though he did not know her ; but is the disgrace even of that attempt, any thing like Macgregor's plan ? which had for its object, to place himself in such a situation that he might, if he found it convenient, at a subsequent period, claim this woman as his wife, to the effect of annihilating the *status* of the children she bore by another husband, and deprive this man of his wife, who, it does not appear, had the smallest idea that she really was married to Mr. Macgregor.

If on that occasion your Lordships thought it necessary to interpose in your legislative capacity, I am sure that, acting consistently, it is impossible, before your Lordships could affirm this judgment, that you should not pause ; and that, in your legislative capacity, you should not send down a bill to the other House of Parliament, to dissolve this marriage, and by that means do

away the chance of this immoral man getting the fruits of the fraud that he has attempted to commit. Fortunately, however, I think I can state to you grounds, which will shew you, that there is no occasion to resort to this extraordinary means of remedying the evil; because I think it is impossible, when the case is explained, not to see that you cannot affirm the decisions of the Court below.

That you may follow me the more easily throughout the reasoning I am about to submit to you, I will state to your Lordships the order in which it is my intention to proceed.

In the first place, I mean to submit to your Lordships, that under the summons, as it is drawn, it would be impossible for your Lordships to affirm the interlocutors now appealed against. In the second place, I mean to submit to your Lordships, that if the summons had been otherwise drawn, and if, instead of charging an irregular marriage at Holytown, of which there is not an atom of proof, if, instead of charging an intention at Edinburgh of celebrating a regular marriage, to give effect to that irregular marriage at Holytown, it had been otherwise worded, and there had been charged in the summons an irregular marriage at Edinburgh, that there is not any evidence that has been produced upon this occasion, I mean any legal evidence, such as can carry conviction to a judicial mind, that there was any marriage ceremony at all took place upon that occasion. Thirdly, I mean to submit, that supposing the summons had been otherwise formed, so as to charge an irregular marriage, and supposing there had been evidence, such as

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was sufficient to convince you that a ceremony had taken place, still the species of ceremony proved, does not exhibit the existence of that free, deliberate, real consent to form the connection of marriage, which the law of Scotland requires, to give validity to an irregular marriage. Lastly, I shall very shortly call your consideration to the cases that have already been decided in the Courts below, and in this House, with a view to shew your Lordships, that you must abandon every principle upon which you have heretofore decided, if you can possibly think of affirming the interlocutors in this case.

I will not detain your Lordships upon the conclusions of this summons. You will recollect, that when the counsel were arguing this case at your bar, I put to them whether they could state any case of this sort, any declarator of marriage brought in Scotland, that had a conclusion where there was a proof of a second marriage, desiring it to be ordained that the parties should adhere and cohabit. There is no such case existing. It is very true, that Doctor Lushington alleged, at first, the case of Mrs. Dalrymple; but that is not a case of a declarator of marriage. It was a case of an action for restitution of conjugal rights in this country, under rules of law perfectly different from those applicable to the present action. It is obvious what was the design of this man in so framing his summons, because if he had concluded for a divorce, her property, being mostly heritable property in Scotland, on which she was enfeft, he might have lost his right to that which it was his sole object to acquire; but waiving that consideration, the interlocutor finds, not that

there was a regular marriage, but that a marriage was celebrated between the Defender and him, by the Reverend Joseph Robertson. Is such a thing mentioned in the summons? It alleges that an irregular marriage was entered into at Holytown. There is no finding that such a marriage was proved. In fact, there was not an attempt to prove it. And the finding is not of an irregular marriage at Holytown, as alleged in the summons, but of an irregular marriage at Edinburgh, which under the words of that summons it was impossible for them regularly to pronounce; and it is impossible, for that reason, for your Lordships to affirm, for before you can, under this summons, find these parties married, you must find, in the first place, evidence to convince you that there was an irregular marriage at Holytown, of which there is not an atom of proof; and then you must have evidence that that marriage derived further efficacy, and further validity from the celebration of a regular marriage at Edinburgh; of which there is not, as I shall shew to you, any thing like a proof.

Having stated thus much upon the subject of this summons, on which I certainly could enlarge much, for a more extraordinary summons than that which has been exhibited to your Lordships in this case, and one more irregularly framed, for the purpose for which it is intended, never was drawn; I will now proceed upon the supposition that this summons had been regularly formed, and assume that this summons had charged a marriage ceremony before Mr. Joseph Robertson, of Edinburgh. What evidence is there that can justify you in judicially finding that any ceremony what-

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ever took place? The evidence upon this subject is like the evidence in all cases where there is a consciousness of deficiency of proof, very various in its nature. The attempt seems to be, to patch up with one sort of evidence the deficiencies which they are conscious of in another sort of evidence; for you have an attempt to establish it by documentary proof, you have an attempt by the evidence of witnesses to establish the fact, and lastly, you have an attempt to establish it by resting upon the admission of the party.

With regard to the documentary evidence, I must submit to your Lordships that there never were documents more deficient tendered to a Court, with a view to produce conviction, upon any subject. In the first place, you have produced to you a paper, intituled a registrate of marriage, and this paper is produced to you with a view to convince you, aided by the evidence of Mr. Bow and Mr. Masson, that there actually was that which it is impossible ever could have existed, and which there is no proof ever did exist, a certificate of proclamation of banns, granted upon this occasion; when I say it is a fact that never did exist, it is confessed never to have existed, by the witnesses brought forward. But it is more material to shew your Lordships that it could not exist. You will recollect that those parties returned from Holytown on Monday, the 20th of May, and at that time, it is asserted, they first formed the design of celebrating this regular marriage *in facie ecclesie*. On Thursday, the 23rd, they were said to be married: now, although there could be no intervening Sunday between the Monday and the

Thursday, you are desired to believe, upon the strength of those documents, that a proclamation of banns actually took place, the parties telling you a story which makes it perfectly impossible.

This registrate of marriage is in the following words: "Registrar of Marriage. Edinburgh, "21st day of May, 1816. Malcolm Macgregor, "printer, Old Church parish, and Mary Macneill, "St. Cuthbert's parish, daughter of Doctor James "Macneill. Edinburgh, 3rd December, 1817. "Extracted from the Register of Marriages for "the City of Edinburgh." Now it is very material that you should attend to the date of the registrate of marriage, which is the 21st of May. The date of the register of marriage is the 22nd, so that you have two documents to prove a fact that is admitted not to be true, and which it is shewn cannot be true; these two documents having dates that would destroy their effect, even were they resorted to, to prove a fact not otherwise impeached.

The next documentary evidence is on a par, at least, with that which I have already described; for you have produced to you, a book of private memorandums of Mr. Joseph Robertson's, a man before whom, it was proved in a case in the Court Session, in the year 1814, (of *Dow v. Adie*) that a private marriage was celebrated, one of the parties being represented by a person hired for the purpose.

This is a book formed by a man who at that time was in prison, for having celebrated irregular marriages, contrary to the act of Charles the second, and for the forgery of marriage lines; and you are desired to give credit to this book, there

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being upon the face of it, obvious marks that a great many of the entries must have been made at one and the same time, in one hand; and, after all, it being only an irregular private memorandum of this man, who was convicted of bad practices with respect to certificates. But, my Lords, you have another document, which, if this had been a regular register, kept by Mr. Joseph Robertson, a man of unimpeachable character, would have defeated the force of this entry; because you have a certificate, in the handwriting of this very same man, of the date of the 29th of May, certifying that those parties were married by Mr. Joseph Robertson on the 29th. Then what am I to believe, if I believe any thing, that is to be inferred from these documents? Did this marriage take place on the 29th? or did it take place upon the 23rd? It is impossible for you to discover upon which day it did take place; for though it has been attempted to confirm this by the evidence of witnesses, you will see that they do not recollect the date of the marriage. I hold, therefore, that it is impossible for you to allow your minds to be, in the smallest degree, influenced by a registrar of marriage, which is contradicted by the register of marriage; or by a book, kept in the irregular manner that I have described, which is contradicted by the certificate of the person who keeps it.

The parties were conscious that this documentary evidence was not worth much, and consequently they have relied upon the *viva voce* evidence of Mrs. Robertson, the wife of this man, and of Miss Robertson, his daughter; and it does so happen, (which is worthy of remark, because

it places those witnesses in a very suspicious situation,) that the very day on which they were examined, was the day on which this man was liberated from prison, and on which his further punishment of banishment was to commence. They were, therefore, persons who had an obvious interest to explain away his conduct, and to make it appear as regular as possible, looking undoubtedly for some mitigation of the punishment which the Court had inflicted upon him.

Mrs. Robertson, his wife, (and it is not alleged that there was any other person present but his wife and his daughter) is the first person examined, and to the first question, which was (Mary Black Macneill being pointed out to her) whether she knew this woman, she distinctly says, that she does not know her, and that she does not recollect ever having seen her before. The moment that answer was given, the witness should have been sent out of Court, as it was quite obvious that no benefit could be derived from her testimony. But that was not the mode that was pursued. Mrs. Robertson's recollection was refreshed, by producing the book to which I have alluded, and reading to her the entry of the marriage, in order that she might, in some degree, gain some recollection of the facts of the case; a proceeding which ought not to have taken place, for this book not being itself evidence, never could have been regularly brought forward to prompt the recollection of a witness, they knew must be willing, from her situation, to say any thing upon that occasion. She is then asked, if she knew Mr. Macgregor. He is pointed out to her, and her answer is, that she

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knows him perfectly, but she never saw him, either before or after the time on which, according to this entry, the marriage was celebrated. This seemed very extraordinary, when she professed to have that perfect knowledge of his person; it therefore naturally suggested this question: How did she recollect a man that she had never seen before or since? to which her answer is, "Indeed, I know very little about it." Now this is one of those witnesses, who are brought forward to identify the parties, and I wish to know whether it is possible for your Lordships to say, that Mrs. Robertson's evidence can be held, in the smallest degree to contribute to your conviction, that Mary Black Macneill and Mr. Macgregor were present on the day on which this ceremony is stated to have taken place, at Mr. Robertson's.

Miss Robertson certainly has a more perfect recollection; when I say a more perfect recollection, that is all I possibly can say; because, though she says she knew Mary Black Macneill as Dr. Macneill's daughter, still it comes out in a future part of her evidence, that she applied to her father, in the course of the ceremony going on, to know whether it really was Dr. Macneill's daughter. With regard to Mr. Macgregor, the evidence is pretty nearly the same with that which her mother gives. The one contradicts the other, both in the fact of there being a lighted candle, and in the fact of there being marriage lines; and the two agree in no one thing but a very important fact, on which I shall presently comment, that Mary Black Macneill did not utter a word from the time she

came into Mr. Robertson's house to the time she left it.

Taking then the *vivd voce* evidence in its utmost extent, you have only the evidence of one suspicious witness, that can tend in the smallest degree to identify the parties who were alleged to be united by this marriage ceremony; and, according to the law of Scotland, one witness is not sufficient to establish a fact; you must concur with me, therefore, in thinking that there is no proof whatever upon which you can rest a judicial decision, that there was any ceremony took place on the 23rd of May, 1826. The parties seem, in some degree, convinced of this, and, accordingly, the defect in the evidence is made up throughout the whole proceeding, by appealing to judicial admissions, and to extra judicial admissions, which it is proved Miss Mary Black Macneill made.

Now, my Lords, I am at present looking at this case, with a view to ascertain whether there is evidence that any ceremony took place; and, therefore, it is needless now to enter into the substance of those admissions, but I wish you to consider this question, whether it is possible that in a case such as this, where you have evidence of a legal marriage, subsequent to the irregular one, said to have been contracted, the admission of the party should be received as evidence, that the marriage actually did take place. If such admissions are received as sufficient evidence, there is no woman who has a fortune of her own, and who wishes to get rid of her husband, to whom she is married, and to betake herself to the arms of her paramour, that

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might not, by connivance, get him to bring a declarator of marriage, and subsequently establish the fact of a previous marriage by her own admission. There is perhaps a feeling of delicacy in the other sex, that is not so prevalent in ours, which might prevent the frequency of such an occurrence; but, if the principle applies to one sex, it applies also to the other; and then any man who has married a lady, who, *bonâ fide*, believes him to be unmarried, any man who has contracted an alliance with a family of distinction, by whom he has many children born, if he takes a dislike to his wife, may get a similar proceeding instituted, on the ground of his having engaged in a previous marriage, alleging that there is evidence of that fact; and then the man has only himself to admit it, to the effect of destroying the *status* of his own children, born in lawful wedlock, and of ruining the reputation of a woman of high rank, and of great family connection, and who never dreamt of any such thing. Your Lordships must be convinced that this must be a precedent of the most dangerous nature. It has been stated, that the law of Scotland, with respect to divorce, gives too great a latitude, but, establish this principle, and then I will venture to say, this House will have very little cause in future to comment upon the law of divorce in Scotland; because, this new device for obtaining a divorce, would be so much more easy, and so much more rapid, that I can not doubt it would totally supersede that law, upon which I have heard criticisms sometimes in this house, and do it away as effectually as if it were repealed by act of Parliament.

I must, therefore, contend that, as there is no *viva voce* evidence, establishing that this ceremony took place, and as the documentary evidence is of such a nature, that your Lordships cannot possibly rely upon it, and, as I trust you will not receive as evidence, the admissions of the party to prove such a fact, that, in point of fact, there is no legal evidence that any ceremony took place, such as you can say ought to bring home conviction to a judicial mind. But, supposing that you could rest upon the admissions of this lady, how far could the admissions promote the object of the Respondent? The general tenor of her admissions, amounts only to this, (here the noble Lord read the admission.)

Now, what does this admission amount to? If there was a marriage before Mr. Joseph Robertson, it was undoubtedly an irregular marriage, and, in law, must be considered as such. Without troubling your Lordships with reference to the reasoning on the law, as laid down by Mr. Erskine and Lord Bankton; without referring to the opinion of Mr. Hume, to the opinion of Mr. Craigie, to the opinion of Mr. Erskine, of Mr. Clerk, and all the great lawyers, given in the case of *Dalrymple v. Dalrymple*, I will venture to say, that I may state this without fear of contradiction, that, in the case of an irregular marriage in Scotland, it is the practice, and it is the law of the country, to take evidence of all the facts and circumstances antecedent to the alleged ceremony; of all the facts and circumstances pending the ceremony, and all the facts and circumstances of the conduct of the parties subsequently to the ceremony: and that,

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from a complex view of all these circumstances, you are to infer, whether that real and deliberate consent was given, which constitutes marriage; and in doing this, you do not resort to the conduct of the parties subsequent to the ceremony, for the purpose of undoing a marriage contracted, but for the purpose of learning whether the parties did, or did not, by their conduct, exhibit a conscious feeling that no such ceremony had taken place between them, as was sufficient to lead them, in their own minds, to the conclusion that they were married persons. Looking, in this case, at the conduct of the parties before the ceremony; looking at the circumstances proved at the time of the ceremony; and looking at the conduct of the parties subsequently, there is not a case in all the books, where there is half the mass of evidence to shew that the parties did not think a marriage was to take place; to shew that the circumstances which attended the ceremony ought not to lead us to feel that a free consent had been given; and, undoubtedly, to shew by the conduct of the parties subsequently, that neither the one nor the other ever conducted themselves, in any one instance, in such a manner as to lead any reasonable mind to conclude that they felt that a consent had been given.

How does the evidence stand? I will not go through it in detail, it would take up too much of your time to read it, but, I have made some short extracts, to shew that Mr. Macgregor himself, antecedent to this alleged ceremony taking place, uniformly held that there was not the smallest chance that he should marry this woman;

that he knew she was pre-engaged to Mr. Jollie. Upon this subject, you have the evidence of a witness, who cannot be suspected, Mrs. Christopher Robertson, the step-mother of Mr. Macgregor's first wife, who states this, "Mr. Macgregor told me he had been with them in the "West Country;" a circumstance which shews the probable date of this communication: "I asked him if he was going to be married to the "Defender? he said no, *Dr. Macneill says he "thinks I will be the man*, but I think it will be "Mr. Jollie, for I know her pre-engagement to "him." Margaret Robertson, the daughter of this Mrs. Christian Robertson, states that she was present when her mother had this conversation, and she proves the same thing to have taken place.

John Carr says that he was walking towards Leith, in company with the Respondent Macgregor, and John Manderson, a witness cited for the Appellant, and, upon returning back again, they met, towards the head of Leith Walk, Mr. Jollie and Mary Macneill. That Macgregor stopped, and had some conversation with Mary Macneill and Mr. Jollie, and upon his joining the deponent and Manderson, the deponent asked him if Mr. Jollie and Mary Macneill were married, to which he replied, that they were not married, but that they would shortly be so. Not therefore contemplating his marriage, but, in conformity to the testimony of the witness, already quoted, stating that such a marriage never would take place, because she was previously attached to Mr. Jollie, and that the marriage would soon take place between Mr. Jollie and her.

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Mrs. Macnaughton, another daughter of Mrs. Robertson, states, in confirmation of her mother and sister, that she heard Macgregor say that Mr. Jollie would be the man, that she knew of his pre-engagement with Mr. Jollie; and, afterwards, you have a witness beyond all suspicion, I might almost say, one who stands in the situation of being the only witness beyond suspicion, I mean Dr. Robertson, the clergyman who is supposed to have performed the ceremony of marriage, betwixt Mary Black Macneill and Mr. Jollie, who says that *a general report* had taken place *in the parish*, that Mary Black Macneill *was to be married* to Mr. Jollie.* How then does the evidence stand antecedent to the marriage? If it had been to be proved from circumstances antecedent to the marriage, that there was a design of marriage with Mr. Jollie, you would have had satisfactory proofs, but, with reference to Mr. Macgregor, there is not any one circumstance which does not go to shew that he himself actually believed that it never would take place.

Now, my Lords, what is the proof of what took place at the time of the marriage? you have this plain matter of fact, that both Mrs. Robertson and Miss Robertson say, that Mary Black Macneill *never gave any consent* whatever; that she never uttered a word during the progress of the ceremony. I admit that in the case of a regular marriage, when the parties come before a clergyman, after due proclamation of banns, where

* See Tait on the Law of Evidence in Scotland, p. 431, where it is said that proof by notoriety, repute, or general belief, is privileged hearsay in the service of heirs, kenning of widow's terce, and other cases, as to the fact of relationship. So as to the shire jurisdiction, or parish, in which lands lie. But these are excepted cases.

they have given their consent to the marriage, as expressed in the marriage settlements, antecedent to the marriage, that a nod of the lady, or a bow in the church would be evidence of consent; but, where you know that parties have appeared who were not the parties to make that bow and that nod, as in the case of *Dow v. Adie*, where you know that every irregularity has taken place, and has been practised, something more is necessary than that nod, which might be sufficient in the case of a regular marriage; it is indispensable that consent should be really expressed, which is not the case, according to the evidence we have here received. Neither is there any proof of a consummation; Mr. Macgregor, indeed, alleges that he attended Mary Black Macneill home to her father's house on that day. Upon other occasions, where parties have gone to the father's house, and passed the night in that house, that might be a circumstance to produce some effect, but Mr. Macgregor had a bed in the house, he was in the regular habit of sleeping there; and the fact is, that there being no evidence of her being in the same bed with him that night, which might have been proved, is rendered much stronger from the circumstance of Mr. Macgregor having a bed in the house. The absence of that testimony is more remarkable, for there was not a servant of the house who might not have been questioned; first, as to whether Mr. Macgregor slept in his own bed? secondly, as to whether he passed the night with Mary Black Macneill? either of which circumstances, would have led to a definite conclusion on this important point. What is the conclusion? First, I say you have

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proof that the parties in no respect contemplated a marriage antecedent to the alleged ceremony; secondly, there is absence of all proof of consummation, which, by the by, is not even alleged in the summons, for there is an allegation of the consummation of the marriage at Holytown, but not of the marriage at Edinburgh.

Thus far then, I maintain that you have no circumstances established, on which a presumption can be founded that, at the time of this irregular ceremony, any real consent was given by the parties.

I have already commented upon the interlocutor of the Commissary Court, wherein it is found that the inference of matrimonial consent is not contradicted by any part of the Pursuer's conduct immediately following the marriage ceremony. I have shewn your Lordships, that even from the time of the celebration of the marriage, the conduct of Mr. Macgregor, and the conduct of Mary Black Macneill was such as to satisfy any body that they were conscious of not being married persons. From the time of this marriage Mr. Macgregor was in the habit of regularly visiting Mr. and Mrs. Jollie, there are no less than eight witnesses who prove being present when they heard him drink their health as Mr. and Mrs. Jollie. There are witnesses who state distinctly that they recollect seeing Mr. Macgregor having a pair of new gloves; John Carr, says, according to the best of his recollection, Macgregor said he had received the gloves as a present at the marriage of Mr. Jollie. This man, who tells you he was married upon the 23rd of May; who tells you that a few days after he took such an aversion

to this woman, on account of her conduct in Pelrig Street with Mr. Jollie, that he formed the resolution of divorcing her, though, afterwards, he brings an action for adherence; this man, I say, is proved, on the 13th of June, within a few days of this, to have received a present of gloves upon the occasion of her marriage to another man. You have this Mr. Macgregor sitting in the same seat at church, listening to divine service, and afterwards walking home, to enjoy conviviality with Mr. and Mrs. Jollie for the rest of the evening. Is it possible to believe that there can exist such profligacy as that, this man knowing that he was married to her, sits in church with the adulterer and adulteress, and goes home with Mr. and Mrs. Jollie, to enjoy conviviality during the rest of the evening, drinking to their healths as such? Must you not, under such circumstances, think that a man who could so conduct himself, must have believed and known that the marriage ceremony was not a ceremony that could be binding? That in fact the parties had never given consent; on that ground his conduct may be explicable, but, on any other ground, it is impossible to believe that he could conduct himself in a manner so profligate and disgraceful.

Mrs. Margaret Miller tells you "that the day before Dr. Macneill's funeral, she put the question to Mr. Macgregor, who it was married Mr. and Mrs. Jollie? to which the Pursuer answered that it was Dr. Robertson, minister of South Leith; and the Pursuer, at the same time, mentioned that he was personally present at the ceremony." If you believe this witness, surely there never did exist such a state of facts

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in the world: but as none of the other witnesses seem to think he was present at the ceremony, the leaning of my mind is to the conclusion that he was not present at the ceremony, but that he very soon afterwards knew it. That he actually accepted gloves is beyond all doubt; that he frequented the society of the parties, heard them drinking to the health of Mrs. Jollie, and drank to her himself in that capacity; that he went, according to the evidence of Mr. Hughes, and Mr. Nicholson, the tailor, with Jollie on the occasion of the death of Doctor Macneill, accepted mourning, which Mr. Jollie presented him with, and which Hughes and Nicholson both state him to have received, is equally undoubted.

Though these facts are strong enough to carry conviction to any one's mind, that it is not in human nature that a woman should have conducted herself in the manner that this woman is supposed to have done, if she was conscious that a marriage ceremony had taken place; or that a man should have conducted himself in the way that Mr. Macgregor did if he had been conscious that the marriage ceremony took place; you have still stronger circumstances that lead to the same conclusion, for in the month of October following this marriage, Mr. Macgregor again attends Dr. Macneill, to advise with him in the management of his property at Stevenston, accompanied by his daughter and Mr. Jollie; and you have the evidence of Mary Hastie, the maid of the inn, who proves that, there being only a double-bedded room, Mr. and Mrs. Jollie slept in the one bed, and Mr. Macgregor in the other. Can you believe that this man thought himself at

that time married to Mrs. Jollie on the 23rd of May? Is it possible that he would not have run from the place, and sought a bed any where, and even slept on straw, rather than have disgraced himself by sleeping in a bed, and seeing the adulterer and adulteress (which they must in his estimation have been, if he had thought he was a married man) enjoying those rights which he had exclusively the privilege to enjoy, in bed in the same room with him? I say, therefore, that when you look at the evidence which has been produced in this case, with reference to the conduct of the parties before marriage, the evidence which is adduced with reference to their conduct at the marriage, and the evidence that is produced of their subsequent conduct, it shews you that there is no reason to suspect that there was any consciousness immediately before or after the supposed marriage, or, at the time at which it took place, that they had really contracted marriage. If it had been otherwise, it is impossible there should not have been some evidence to shew that the parties had consummated the marriage which has been charged in the summons; and lastly, it appears that there never were any two people, who conducted themselves in a manner tending more strongly to induce you to believe that they were not married people, and to create a positive belief, that they themselves never thought that the ceremony was binding: certain it is, that they never for one moment acted upon it as if it had been such.

It is impossible under this summons, drawn as it is, to affirm the decision of the Court of Session, which is declaratory of a fact that is not even alleged; or to find that there is any legal evidence,

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such as ought to convince a judicial mind, that any ceremony took place at Edinburgh; or that the ceremony, such as it is, which the evidence attempts to persuade you did take place, is a ceremony from which you can infer that deliberate consent immediately to enter into marriage, which the law of Scotland requires.

I will call your attention to one or two of the cases which have been cited, to shew your Lordships the spirit of the decisions which have heretofore been made in this House, and before the Court of Session. We have in the books, cases similar to this in one respect, viz. cases of declarator of marriage where a second marriage avowedly took place, such as the case of *Malcolm v. Cameron*, and *Napier v. Napier*; and it is very important that you should advert to the evidence which Mr. Hume gives in the case of *Dalrymple v. Dalrymple*: you will there see, that in those two cases he states that the principal ground of deciding against the first marriage, was because the parties lived in the same town, and had allowed a second marriage to take place, and had allowed a length of time to pass, the second marriage being unchallenged. How much stronger is this case, which exhibits a person living in the same house, and accepting gloves on occasion of the second marriage ceremony, daily frequenting the society, and living in habits of intimacy with the parties contracting the second marriage, and actually sleeping in the same bed room with them? To be sure this is indisputably a much stronger case than that of *Napier v. Napier*, yet in that case the circumstances were found sufficient to induce the Court to decide against the validity of the first

marriage, though there were strong circumstances to prove consent in the case of the first marriage.

You have then the case of *Patrick Taylor v. Kello*, decided in this House. In that case, the parties exchanged mutual declarations, such as if it had not been for their conduct, either before or after the time of marriage, (which the Court always takes into consideration, pronouncing upon a complex view of the whole case) would in their judgment have constituted a marriage in the law of Scotland. The writings they interchanged were to the following effect. The lady signed this: "Skirling Mill, February the 16th, 1779. I hereby solemnly declare you, Patrick Taylor in Brickenshaw, my just and lawful husband, and remain your affectionate wife." He on his part signed a similar paper, and signed himself her affectionate husband. An action of declarator having been brought in the Court below, the marriage was held to be valid; and it came to your Lordships' House, but it appearing to you, that at the time of the interchange of those letters, there was an understanding, which was inferred from the conduct of the parties, that those letters were to be given up on demand, this House reversed the interlocutor of the Court below, and found that there was no marriage. Now, my Lords, how feeble is this case in comparison to that which your Lordships now have before you? This is not a case where the parties agreed to withdraw the written documents on demand, but a case where the one party stands by, and sees the other party married, and the other absolutely contracts a marriage, and they conduct themselves to one another as if they had never

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dreamt of the marriage ceremony having been performed.

In the case of *McInnes v. Moore*, in December 1781, the House of Lords reversed the interlocutor of the Commissary Court, and of the Court of Session, because it appeared that though the letters which were produced were sufficient to constitute marriage, they were written and delivered, not with the intent of contracting marriage, but with the intent of getting the lady the privilege of lying-in in the house of her own relations. Upon this ground, the House of Lords reversed the judgment, shewing that, in a case where the circumstances were infinitely slighter than that of Macgregor's, yet they were sufficient to destroy the effect of the consent to marriage.

The case of *Macgregor v. Campbell* is a very strong case. It appears that Captain Campbell, an officer in the army, formed a connection with a woman who was cohabiting with him, that he admitted his brother officers, and their wives, to visit her as his wife, and that she was by habit and repute received as such; but on the validity of this marriage being challenged, it appeared that this woman had actually received wages and livery meal, which is board wages according to the language of Scotland; that she displayed herself not as acting in the capacity of wife, but in that of his servant. Upon that evidence, the inference from other facts was rebutted, and it was declared that the marriage was invalid, because she continued to accept the wages which she had been in the habit of receiving antecedently. How much stronger is this case? where the party is proved to have connived at a marriage with ano-

ther man, living in habits of intimacy with his alleged wife, and never stating any claim to her.

There is one branch of evidence which has escaped me, and I do not wish to omit any thing which can, either in one way or another, be deemed of importance. What I allude to, is the attempt to establish in evidence the intention of the parties to marry, as is inferred from the evidence of Mrs. Kinlay, alias Shewan. Mrs. Kinlay is first examined in the year 1819, and she tells a story that she had received from Mary Black Macneill three pieces of stuff, for the purpose of making a gown, and a piece of linen to make a shirt, in contemplation of her marriage, stating that, on that occasion, Mary Black Macneill asked Mrs. Kinlay to be a bride's maid; when pressed whether it was with a view to a marriage with Mr. Macgregor, or Mr. Jollie, she declared in the year 1819, that she could not say which. This woman is again examined in the year 1823, and some how or other, there is a great difference between the year 1819 and the year 1823: in the year 1823 it comes fresh to her mind, that it was with a view to marry Mr. Macgregor, for she then, in her evidence, states that she recollects perfectly when she heard of the marriage with Mr. Jollie, having said to Mrs. Craig, "Good God, is it possible she can be married to Mr. Jollie, when she asked me to be her bride's maid upon the occasion of her marriage to Mr. Macgregor." It is needless to comment upon the evidence of a witness who stands in such a suspicious point of view, that in point of fact she recollects distinctly in the year 1823, facts of which she knew nothing in the year 1819, reversing the order of human

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nature with regard to recollection; but it so happens that the evidence of this woman, Mrs. Kinlay, is contradicted in other respects, because, unfortunately for her, she states that she gave that piece of linen to be made into a shirt to a woman of the name of Leslie, and Leslie states that she recollects dressing and carrying home that shirt on Saturday night; it must therefore have been with a view to the marriage of Mr. Jollie, and not with the view to the marriage of Mr. Macgregor, because you will recollect that Mr. Macgregor first formed the design of this marriage upon Monday, the 20th of May, and that the marriage, as alleged, did actually take place on the Thursday following, the 23d of May, and that there could therefore be no intervening Saturday for this shirt to be delivered.

There is another point which escaped my recollection, in going over the evidence, I mean, the details given by Mr. White, the lapidary, and Mr. Neill, the printer, brought by Mr. Macgregor with a view to shew that he, in two instances at least, subsequent to the marriage was acknowledged in the character of husband to Mary Black Macneill. Now, I confess to you, it is impossible for me to give credit to either of those witnesses; can I believe that Mr. Macgregor brought his friend Mr. Neill, in the beginning of July, to the house of Dr. Macneill, for the purpose of introducing him to his wife, and introducing him to a person as his wife, from whom he had accepted gloves on her marriage with another man? and that he introduced him to a person as his wife, of whom he had expressed his disgust, in consequence of the interview in Pelrig Street, and

declared a fixed and settled intention, as early as possible of divorcing her? The story is not credible, and it is totally inconsistent with the other facts proved, of his drinking her health as Mrs. Jollie, and associating with her and Mr. Jollie, they living as man and wife.

Neither can I believe the evidence of White; the lapidary: indeed the whole force of it depends on whether, at the time of uttering the words imputed to Dr. Macneill, he was looking at Mr. Macgregor, or at his daughter; if Dr. Macneill, looking at Mary Black Macneill, who was in the room at the time, said, "you will get it all by and bye," the thing is quite clear; and that is much more probable, under the circumstances of the case, than that he was directing his eyes towards Mr. Macgregor. Consider the whole detail of Dr. Macneill's conduct, when present at the marriage of Mr. Jollie. Dr. Robertson, the minister of North Leith, distinctly proved, that Dr. Macneill told him that he would take his part in giving away his daughter; that he said to Dr. Robertson, in reply to some observations of his, that he had done a great deal for the parties, and he would do more. Can you believe that this man, within two days or three days of this having taken place, went to Mr. White, the lapidary, for the purpose of declaring that Macgregor, instead of Jollie, was married to his daughter, and uttering the sentence that he is said to have uttered, with a view to express that the whole of his fortune would belong to Mr. Macgregor? or is it not more reasonable to believe that, in point of fact, all he meant to say upon that occasion was, fixing his eyes on his daughter, "It will all be yours"?

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On all these considerations, I must submit to your Lordships, that it is impossible you should, under the circumstances of the mode in which this summons is framed, sanction and affirm the interlocutor of the Court below, in this case; that there is no evidence, on which you can legally rely, to prove that any ceremony whatever took place on the 23rd of May; and that, at all events, the ceremony which is proved is such, taking into consideration all the conduct of the parties before and after that, in conformity with your Lordships' former decisions, it is impossible you can say it proceeded on that free, that deliberate, that real, and that immediate consent to enter into a marriage, which is the species of consent required in an irregular marriage, under the law of Scotland. With regard to the nature of the judgment, I will read at present the sketch of the judgment I am inclined to propose; but I should think it much better to delay this, for the purpose of taking some time to consider how it should be worded. I confess that I should very much wish that, in this important case on the law of marriage in Scotland, your Lordships should introduce the allegations in the summons, as well as the conclusions thereof, so as to bring before the minds of the Judges in that country the precise grounds on which you determine; and I should think it very desirable, as the Court have obviously adopted the interlocutor they have pronounced, for the purpose of declaring that an irregular marriage had taken place at Edinburgh, that your Lordships should negative that conclusion, otherwise the effect of your judgment would be, that of dismissing this action, but leaving the parties in

such a state that they may bring a future action, charging an irregular marriage at Edinburgh; which I am sure you would not wish, after all the litigation which has taken place. The heads of the judgment I would suggest to your Lordships are, that on due consideration of all the facts and circumstances established by the evidence in the Court below, in an action of declarator of marriage, at the instance of Malcolm Macgregor against Mary Black Macneill, by summons on the 25th of March, 1818, wherein it is set forth “that an irregular marriage was celebrated between the said Mary Black Macneill, daughter of the late Dr. James Macneill, in the spring of 1816, which was consummated by their sleeping several nights together in the same bed; and, further, that they considered it proper on their return to Edinburgh, in the month of May, 1816, that no time should be lost in celebrating, in *facie ecclesiæ*, that marriage which had been irregularly celebrated between them; and, accordingly, that they were in the month of May, 1816, regularly married by the Reverend Joseph Robertson, minister of the chapel in Leith Wynd,” it appears to this House, that there is no proof whatever of any marriage between those parties having at any time taken place, or any regular marriage, in *facie ecclesiæ*, having been celebrated at Edinburgh, in the month of May, 1816; neither does it appear to this House, taking into consideration the facts established in evidence, in relation to the conduct of the parties, both before and after the 23rd of May, 1816, and all the other facts and circumstances proved, that there is evidence sufficient to justify the conclusion

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that the said Mary Black Macneill, and the said Malcolm Macgregor, did at that, or at any other time, voluntarily, and deliberately express that mutual consent immediately to contract marriage, which, by the law of Scotland, is necessary to give validity to an irregular marriage. That, on these grounds, this House reverses all the interlocutors complained of, and remits the cause to the Court of Session, with instructions to the Commissary Court to dismiss the action of declarator of marriage.

It would be sufficient merely to state that you assolzie the defendant, Mary Black Macneill, from all conclusions therein; but, in this case, I should prefer adopting the form to dismiss this declarator, raised at the instance of the pursuer Malcolm Macgregor, by summons, of the date of the 25th of March, 1818, absolving the Appellant, Mary Black Macneill, from the conclusions thereof, that she should be declared married to the said Malcolm Macgregor.

Lord Eldon.—My Lords, if this was not one of the most important cases that has ever occurred, in the course of my experience, before any Court of judicature, I should be perfectly satisfied with what has been already stated to your Lordships, that there is sufficient ground to reverse the interlocutor of the Court of Session.

But I am anxious, for different reasons, at least to occupy a short portion of your Lordships' time; I am extremely desirous that it should appear that this judgment, at least as far as I am concerned in agreeing to it, does not proceed upon suppositions and notions, which, unless we protest against them, may be understood to be involved in the

effect of the judgment. When I first looked at these cases, and saw that the summons concluded with desiring that it should be found and declared not only that these parties were married, but that it should be decerned that the Appellant should return to her husband; that he should enjoy what is called, in this part of the country, a restitution of conjugal rights, I could not help feeling considerable doubt whether, supposing there ought to be a declarator of marriage, this was a case in which, at the instance of Mr. Macgregor, you would compel this woman to return to cohabitation with him. I have reason to believe that no such judgment would have been given in this part of the island; and I have further reason, from what I see of the conduct of the parties, to believe that Mr. Macgregor had no wish that any such judgment as that should be given. When I look at the process with respect to the property, I think that the principal reason for praying a declarator of marriage was, not to repossess himself of the person of the lady, but to get the enjoyment of that property, to which he would insist, as the husband of his wife, he might have some claim. I desire, therefore, that it may be understood, if we are to consider this, as I believe it to be, an appeal from an interlocutory judgment of the Court of Session, brought under the authority of an act of Parliament, in consequence of a difference of opinion amongst the judges, that your Lordships will be pleased to allow the individual, who has now the honour of addressing you, to say, that he does not admit; (he does not deny, because it would be improper that he should either admit or deny) that he

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desires to be understood as standing quite neutral upon the question, whether this lady ever could be decerned to return to the embraces of Mr. Macgregor.

My Lords, there is another point upon which I am exceedingly anxious to be perfectly distinct, and that is this: that when you are once satisfied that, according to the law of Scotland, there has been actually a marriage between A. and B., no subsequent conduct is to be received in evidence, in order to entitle you to say that that marriage which has been actually had, and actually celebrated effectually, is to be undone. If it be a regular marriage, actually celebrated, and completely contracted, it is not to be undone upon probabilities, arising out of subsequent acts and circumstances. On the other hand, notwithstanding what has been said about these Scotch marriages, that they are very easily formed, and very easily got rid of, I take it that there is nothing that the law of Scotland more clearly, more solemnly, or more consistently insists upon than this, that where a marriage is alleged to have been had, by a promise *per verba de presenti*, or by a promise *per verba futuro*, or by virtue of the implied promise, that arises out of cohabitation, habit, and repute, there is nothing it does so solemnly require, as that the consent to marry should have been full, deliberate, and free; that it should neither be the effect of force or fraud.

I desire also to give no opinion upon the question at present, for it is not before the House, though it is a question of very great consequence in my judgment, namely, whether you can, or cannot, there having been a regular

marriage in *facie ecclesiæ*, give evidence whether the marriage intended to be had was effectually had? Upon that I desire to express no opinion whatever, upon which some cases are found in the prints upon the table.

I am therefore exceedingly anxious, in this very important case, to press upon your Lordships' attention, this, as what I take to be an indisputable proposition in law, namely, that if you find there was a marriage duly celebrated, actually had, that marriage cannot be got rid of by evidence of facts and circumstances done, or observed by persons afterwards, thinking it proper to disentangle themselves from the connection of marriage, actuated by caprice or dislike of each other, or a base motive of inducing other persons to think that they may form matrimonial connections with the parties. When once you have got clearly to the conclusion that a marriage has been had, that marriage must be sustained, let the consequences be what they may of sustaining it with respect to third persons. Therefore the question now before your Lordships is really this: was the ceremony that did take, or is alleged to have taken, place at Joseph Robertson's, upon the 23rd of May, was it a mere ceremony gone through? or was it, on the other hand, an actual constitution of marriage? If it was an actual constitution of marriage, I am afraid we must consider it to be an actual constitution of marriage; you cannot undo it by reasoning upon circumstances, which may have great weight upon your minds, leading you, however, deeply to lament that any such thing had taken place.

I would beg to add here, that, in giving my

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humble opinion upon this case, I feel myself fortified by what I have been desired to state, that, upon a very anxious attention to this case, a noble relative of mine, who long held the situation of Judge in the Ecclesiastical Court of this country, gives his full assent to its being stated to your Lordships, that he could not possibly sustain this marriage.

Having said thus much, I am led to revert now to the consideration of the substance of this summons. I hope I may be excused, taking into consideration that I had the honour of sitting in an important judicial seat, the most important judicial seat, in this House, for nearly twenty-five years, if I take the liberty to repeat, perhaps for the last time, that which I have often before stated, that I do most anxiously wish, whilst on the one hand no man has been more desirous than I have been, whatever may have been said to the contrary, that questions arising upon the law of Scotland, should be decided here upon the grounds and principles of that law, and that we should not govern ourselves by English principles, or the application of English law, where it cannot be applied consistently with the principles of the law of Scotland, I say I trust I may be excused, if I express my anxiety, for the sake of the judicature of that country, that their pleadings may be somewhat more accurately attended to, than they usually are. I have been very much struck with the extraordinary nature of the present summons from the first, and also upon the intermediate consideration of this case, and upon the present consideration of this case. Taking the summons to be what we call the

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declaration of the party, the Pursuer, it is next to impossible for any man to reconcile what he is pleased to state in the summons, with what the real nature of the case is, as he has since made it out, by the proofs he has offered to you, in order to induce you to decern in his favour.

I shall not trouble your Lordships, by repeating what has been very accurately stated already upon the subject of the connection, (not the relationship, but the connection,) that subsisted between these different parties, before the occurrences, which form the subject of your Lordships' consideration, took place. I begin, therefore, by adverting to the journey to Holytown, in the spring of 1816, and let it be remarked that, unless I have deceived myself, upon looking at this evidence, or by looking at it too often, which is sometimes the case; let it be remarked that, before the journey to Holytown, it seems to have been pretty well known to Mr. Macgregor that Mr. Jollie was a suitor to this lady; and not only a suitor to this lady, but Mr. Macgregor seems to have felt that Mr. Jollie was preferred by the lady to himself. Mr. Macgregor, and Dr. James Macneill, who, let it be observed, was a clergyman, as well as a medical man, go, according to the summons, to Holytown in the spring of 1816 on a jaunt, in company with the Appellant, natural daughter of Dr. James Macneill, where an irregular marriage between them is alleged to have been celebrated by Dr. James Macneill; an irregular marriage is alleged to have been celebrated, and the marriage to have been consummated by their spending several nights together in the same bed, at Holytown aforesaid. If

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you come to look at the condescendence, that important circumstance, of sleeping in the same bed, is softened down to something of this nature, to its being stated that they slept in the same room; and the actual fact is disguised, both in the summons, and in the condescendence, that fact which has been spoken to by Mary Hastie, a servant in the house, and who represents thus—but before I state what her representation is, give me leave to say, that this matter of consummation, that is alleged to have happened at Holytown, was capable of proof, and might have made an end of the whole matter; but instead of there being any such proof, all the proof that there is, the great weight of evidence, as far as relates to it, is the testimony given by Mary Hastie, which goes directly the other way. If it had been true, that Dr. Macneill, a clergyman, married these parties; if there was mutual consent on both sides, and Dr. Macneill, the father of the lady, a clergyman, gave the benediction, and put their hands together, in the manner that is stated in the condescendence; if that had been true, what difficulty was it likely there should be, (unless Scotchmen differ from Englishmen) in their going into the same bed? There would have been consummation quite of consequence; it would have been the natural consequence, and nothing else could have happened.

Now what Mary Hastie says upon that is, (and if consummation, which, with respect to this marriage, you observe, is stated in the summons, had taken place, it was impossible that Mary Hastie's evidence can be true; but there is nothing to contradict it)—What she states is this: that it

happened unfortunately, in this Scotch inn, that there were not beds enough, or rather, not rooms enough for three persons to have separate rooms, there being two beds in one room, and one bed in another; and the Doctor having taken care of himself, by going to bed first, a difficulty arose what was to be done. It seems a difficulty existed in the actual circumstances, viz. that the bride and bridegroom, as the summons represents them, could only find out one room with two beds in it. I think they would, in all probability, have been satisfied with one bed, if they had been married at that time, as it has been alleged; at least I should suppose so. But an arrangement is made in a very curious way, and, as far as we have any evidence, instead of there being consummation, we must hold there was no consummation, because Mary Hastie says, that the lady was disturbed at sleeping in the same room with her newly acquired husband; that he slept in one bed, and she went to another bed; but she had just so much delicacy, which I am very glad to see among our neighbours in the north country, that she would not go to that bed, unless it was surrounded by sheets, so that even her husband could not set the eyes of his affection upon her. They accordingly slept in separate beds the whole night, and instead of any body being called to prove those circumstances which would have been undoubtedly proved to establish consummation, if it had taken place, the whole evidence tends directly the other way.

What is done next? The parties return to Edinburgh upon the 20th of May, in the same year, 1816, and this ceremony at Holytown hav-

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ing been thought very irregular, (though Dr. Macneill was a clergyman,) and no consummation of the marriage having taken place, it was thought there should be some regular marriage, so the summons states it, or rather that that marriage at Holytown should be regularly celebrated at Edinburgh. This marriage at Holytown is in the summons considered as an irregular marriage, and in the proceedings no proof is made of it. If this was an irregular marriage, the defect of proof of which was to be supplied by another ceremony of marriage at Edinburgh; if that marriage at Holytown, as the summons states it, was to be regularly celebrated at Edinburgh; if this celebration was to be free from all objection, Macgregor proceeds in the most uncommon course that, in affairs of this kind, one has ever heard of. See how it is carried on: on the 20th they get to Edinburgh. Here I may as well state that a regular marriage in Scotland is, as I understand it, a marriage after publication of banns has taken place three times. In Erskine's Institutes, he gives a very good reason for that: he says, that the banns must be proclaimed three times in the church, because it gives people time to consider whether, by the third Sunday they will or not consent; but Mr. Macgregor thinks that the right way of getting rid of the difficulties that belong to that irregular marriage, and that private marriage, at Holytown, is—to do what?—that the right way is, upon the 23rd, to procure, or to endeavour to procure, a certificate of the publication of banns, as having taken place upon three Sundays, which could not possibly have taken place, because between the 20th and 23rd no

Sunday whatever could have intervened; and then he thinks it proper to apply himself to Mr. Smith, stating that he means to be married that night; Mr. Smith mentions it to his clerk, and some persons connected with him, and they have a direction given them where to attend upon that night. Mr. Smith himself could not go; the clerk, I think, does go, according to the direction, to the Black Bull, and he finds nobody there. But this ceremony of marriage is had in the evening late: there is a difference about the time of night, Mrs. Robertson saying there was a candle, and Miss Robertson saying there was no candle; but for the purpose of having a public, indisputable, regular marriage celebrated before Joseph Robertson, there were Mrs. and Miss Robertson present at the ceremony, which, I suppose, could not have been made any better, by his being a clergyman of the Church of Scotland, than the marriage by Dr. Macneill himself, he being also a clergyman of the Church of Scotland. A ceremony passes at the time of night spoken to by Mrs. Robertson and Miss Robertson, and that is the only evidence, unless it is supposed to be evidenced by the book, the contents of which are inconsistent with some other parts of the evidence; a book, with reference to which I have wished to hear, but I have not heard yet, what made such a book as that produceable in evidence; it may however be so. I know why a register in England is admitted in evidence—because it is kept as the law requires it to be kept. The law requires that there should be such a register kept, in a particular manner and form; but whether a private book, kept by a private clergymen, not in such manner

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and form, not under and according to the authority of the law, would be evidence in England, is a question which could scarcely bear to be agitated.

Now I will not follow my noble and learned friend, if I may take the liberty to call him so, through all his statement of this case, because upon such a subject as this, he is much more competent to speak than I am : and I am happy to acknowledge, at this time of my life, the benefit I have received from his communications with me upon the Scotch law. I will not follow him in discussing the effect of the evidence of Mrs. and Miss Robertson, as to its being, or not being, defective in the respects in which he has contended that it is defective. After observing that I wish not to be understood to have conceded it to be clear, that a cause of this sort should go on without other parties to it, or that there is not great danger in admitting a marriage, certainly unobjectionable in form and circumstances, such as the marriage with Mr. Jollie, to be affected by the admission of the woman, who is represented to be a party in both marriages, I proceed here to say, that, notwithstanding all the difficulties that rest upon the testimony of Mrs. Robertson, and Miss Robertson, I must look at this case, as a case in which the woman's admission has been read and used as evidence ; and whatever observation may be made upon the evidence of Mrs. Robertson, as not sufficient to prove the identity of the parties, or the particulars of the ceremony, in her admission this lady herself has made an acknowledgment that some ceremony of some sort took place at the house, where she and Macgregor were pre-

sent. But then you must take the whole of her admission together, and taking the whole of her admission together, the question turns round again to be this—Can you, or can you not, admit evidence of facts antecedent to that period? Can you, or can you not, admit evidence of facts and circumstances subsequent to that period, with a view to aid and confirm her in her admission, taking it altogether, in which she represents that what then passed, was not a case in which she can be held to have given consent, much less that free, solemn, full, and deliberate consent, upon which Macgregor claims, as against her, the character of husband?

Now, my Lords, that you may, with respect to what are called irregular marriages in Scotland, look at prior facts and circumstances, and that you may look at the subsequent facts and circumstances, I take to be quite indisputable. The next question, therefore, is—Can you look at such facts and circumstances, with respect to an alleged marriage, such as is represented to have been had in this case? Can you look at them as evidence to enable you judicially to determine whether there has been effectually had, a marriage?

With respect to irregular marriages generally, there can be no doubt at all, looking at the text writers; there can be no doubt if you examine the opinions of the Scotch lawyers, which are to be found annexed to the case of *Dalrymple v. Dalrymple*, and I take it that the opinions of the Scotch lawyers would be evidence of what is Scotch law. We have the illustrious names which are there mentioned, to which I may generally

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refer your Lordships: we have the illustrious names of Erskine, Craigie, Hamilton, Hume, Dr. Hay, and a gentleman whom I shall call by the name of John Clerk, for fear you should think I am mentioning myself, and Cathcart, and Gillies, and Sir Islay Campbell.

Then the next question is—Is this alleged marriage such as is to be looked at by the application of the same rules of law that apply to the marriages mentioned in the books as irregular marriages? I find in these papers that doctrine of the same nature has been applied, in two or three cases even of regular marriages.

I have already desired to protect myself against its being understood that I give any opinion, whether it can or not be applied to what is strictly called a regular marriage in *facie ecclesiæ*; but if there have been decisions that apply them to regular marriages in *facie ecclesiæ*, surely there can be no difficulty in applying them to a marriage that is not a regular marriage; and then comes the question, is this a regular marriage?

Now the authority of the text writers, holds this not to be a regular marriage, because they say it must be a marriage with proclamation of banns; here there could be no proclamation of banns. My Lords, I cannot adopt that expression, without guarding against its being understood that I mean to intimate that, if there is an irregular marriage without proclamation of banns, but where there has been a full, actual, deliberate consent given, that any subsequent circumstances will authorise you to say, that that irregular marriage can be represented in any way as invalid. I do not mean to call in question at all the

validity of such marriages, God forbid I should, but if you have defective evidence with respect to the actual proof of a deliberate, clear, and solemn consent in the transaction of the ceremony, the question then is, whether you may not admit evidence with respect to this species of marriage, as an irregular marriage, such as you will admit with respect to other marriages that are acknowledged to be irregular marriages? and seeing that it is constantly admitted in irregular marriages, it does appear to me, I own, in this case, admissible evidence.

The next question will be, if it is admissible evidence, what is the effect of it? Now undoubtedly, with reference to that, I must say, with these eminent men whose names I have mentioned, that though there may be, with respect to a great many cases, doubts whether those decisions are just applications of the evidence, upon the effect of which the decisions have been made, that does not affect the principle at all of the admissibility of the evidence, and the duty of the court to attend to the full effect of the evidence, according to the best of its judgment, when that evidence is offered to its consideration.

With respect to cases of marriage, where the young man is fourteen and the young lady twelve, these are cases, in which perhaps more effect has been given to the supposed operation of deceit and fraud upon such persons than perhaps can be fully justified, recollecting that the law has said, that at those ages they are perfectly capable of giving full, and deliberate, and sufficient consent, though some allowance must be made for the difference of discretion between

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twenty-one and fourteen, yet, with respect to this particular contract, the law, strictly speaking, has held them equally capable as older persons of giving their consent. With respect to all the cases, to which I am now alluding, both with respect to those very young persons, and with respect to other persons, in those cases that have fallen under the consideration of the Courts, it does appear to me one matter is worthy of great consideration, *viz.* what is the effect of all that passed with respect to the question, was free, deliberate, full, and solemn consent given at the time when the ceremony passed? or did the ceremony pass without that which constitutes a marriage, such a consent to the *consortium omnis vitæ* at the time of the ceremony?

Now, my Lords, if that be so, let us look and see what the case is with respect to the conduct of the parties. I think it is sufficiently proved in this case, that before the parties went to Holytown, Mr. Macgregor was fully acquainted with the circumstance that Mr. Jollie was a preferable candidate. There is, in my judgment, no proof of the truth of that assertion, which is to be found in this summons, that a marriage ceremony took place at Holytown, or that a marriage there was consummated; but I go further than that, because I think myself judicially authorized to say, that the allegation, with respect to that supposed marriage at Holytown, is utterly unfounded, that there was no marriage there of any kind—that none was there consummated.

When the parties come back again to Edinburgh, what is done, for the purpose alleged in this summons, of having a regular mar-

riage? for the purpose of having a public regular marriage, a public marriage in order to cure all the evils and inconveniences that might arise from a private irregular marriage, that is so alleged to have taken place at Holytown, they go to Mr. Joseph Robertson's. If such was the purpose, how does it happen that you can scarcely find any thing in this evidence, (I do not say there is absolutely nothing, but there is nothing that I think you can call material or substantial, when thoroughly examined with all the proofs) by which it appears, that Dr. Macneill, that any friends of the family, that any persons who visited, that any persons who had any intercourse with the family, had ever heard of such a thing as that this marriage was intended, and that it was to give regularity and publicity to the former marriage.

My Lords, we know very well what happens in England about such things. If parties have gone to Scotland and got married, and are to be married again in England, does not every man know, that under such circumstances, the purpose of having the marriage is to satisfy all the friends and connections, as well as the parties themselves, that the holy estate of matrimony has been effectually and properly contracted. That is one of the purposes, as well as the purpose of giving ease and happiness to the minds of the parties themselves; and I believe it would be thought a very extraordinary thing, if a marriage for that purpose was to be had here without any body in the world having previously heard of it. Joseph Robertson, the priest, and his wife and daughter, are the only persons who know of this ceremony of marriage, except the individual parties to it.

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Can any man suppose, if Dr. Macneill had, according to the allegations of this summons, at Holytown given away his daughter in marriage, had put her hand into the hand of this gentleman as her husband, and given the priest's benediction upon that occasion, that Dr. Macneill, between the day on which that marriage happened at Holytown and the 23rd of the month of May, should have become so weak and impotent in point of understanding, or so dreadfully addicted to drinking, that they would not let him know any thing at all of the matter? there is no proof that he knew any thing at all of this matter. Can any body believe that, if Dr. Macneill had conducted himself at Holytown in the way stated in this summons, can any man believe that Dr. Macneill would not have been present at this marriage, if such a marriage was to be had? but not only do you find that Dr. Macneill did not know of it, but, bating the evidence of the application to Smith, and Smith's communication to his clerk generally, and the reference of Smith and his clerk to the Black Bull inn, (your Lordships know what followed on that communication and reference) no human being seems to be acquainted with this intended marriage previously to the ceremony, but the very individual who ought to have known nothing of it, if it was intended to be a satisfactory celebration of marriage, I mean the man who appears to have been a disgrace to his profession. Of Mrs. and Miss Robertson I say nothing, but I am sure no person, meaning to celebrate a regular marriage, in order to support an irregular marriage, would think of being married at that time of night, in the house of such a

man as Joseph Robertson, with no witnesses but these ladies, and not only with no other witnesses, but without a single person out of the room where this ceremony of marriage was performed, being acquainted with the matter that was to take place, or with the purpose for which they were supposed to go there, and having it in their power to attend.

Then what says the summons in another respect? Those, who know any thing of the law of Scotland, know the immense importance of the allegation of, and proof of consummation. It is not even alleged in this summons that this marriage was consummated; but I can conceive a reason for not alleging it, for I am satisfied it was not consummated.

My Lords, I agree in this, that the story Mrs. Jollie states, is improbable; but, is it half so improbable as the story that Mr. Macgregor states? Can any body doubt that, if this was meant to be a regular marriage, in order to do away the objections against an irregular marriage, can any body doubt that there would have been proofs of consummation, when Mr. Macgregor must have known there were,—at least I think there were proofs of the non-consummation at Holytown? Can any body doubt you would have had such proof by the servants in the house of Dr. Macneill? But there is not the least evidence that deserves the name of an attempt to prove consummation at Edinburgh; and, allow me to say, there is evidence to the contrary. When you come to consider the conduct of Mr. Macgregor with respect to Mr. Jollie, (and here let me notice that unless I misunderstand this evidence, it does not

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appear that Mr. Jollie was ever acquainted with what passed before Joseph Robertson at this strange place; it does not appear that Mr. Jollie had ever been acquainted that Mr. Macgregor was the husband of this lady, I do not find any evidence of that, if there is any evidence of it, I have passed it by.)

Lord Chancellor.—No, there is not any.

Lord Eldon.—When you come to consider that after this, Mr. Jollie is united to this lady, upon the 13th of June, I think it is, in the subsequent month, and when it is proved that Dr. Macneill, who is said by this summons to have given his consent to the marriage, and performed the ceremony of marriage himself at Holytown, when you consider that he is present; goes to Dr. James Robertson's, that he goes there, and conducts himself in the deliberate, solemn, serious manner, in which Dr. Robertson states his conduct to have been regulated, whilst he gives away his daughter to Mr. Jollie; when you consider further, that there has been an attempt made to prove, (let those believe it who can, after having read the evidence of Dr. Robertson, and of his lady) that this Dr. Macneill was in a state of such imbecility, either from drunkenness, or a failure in his constitution, or some other cause, between the journey to Holytown, and this marriage, upon the 13th of June, I say, that the evidence in my judgment, which goes to impute to Dr. Macneill (in order to render inefficacious the evidence on the other side as to the state of Dr. Macneill) that imbecility, from whatever cause it arose, that evidence I say must have been brought for the purpose of destroying the effect, the dreaded

effect of the important inferences to be drawn from his attendance on the marriage of the 13th of June, and his non-attendance upon the other, on the 23rd of May. The attempt to prove that imbecility, in my judgment, wholly fails; I should have thought myself bound by judicial oath, if I had been trying this before a jury, to have told them they ought to give no credit to that testimony.

My Lords, it does not rest there; so far from Mr. Macgregor supposing he had a right to the person of this lady, I find in the evidence that it is usual to give the friends, upon a Scotch marriage, gloves, that is the present that is made to them, and Mr. Macgregor receives a present of gloves, as a friend and well wisher to the parties who had just been married: he does not attend, I believe at the wedding dinner, but he very frequently afterwards is to be found as a guest in the house of the parties; and when we come to the month of October, in the year 1816, these parties go to Holytown again, and the Doctor goes too. He was so far recovered from this imbecile state, in which it was attempted to be proved that he was at the time of the marriage, in June, 1816, he had so far recovered from his malady as to be able to go there again. Mr. Jollie and Mrs. Jollie; and Mr. Macgregor and the Doctor, form the party; and here let us see whether we can come exactly to the conclusion that parties are sleeping in the same bed, because they are sleeping in the same room, as in the antecedent spring. What is the conduct of Mr. Macgregor? Who is now to convince us that there was a real marriage, with full, free, and de-

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liberate consent given upon the 23rd of May, 1816?—he is at Holytown along with the parties. What are the beds required? Doctor Macneill is there, and has a bed to himself; another is required for Mr. and Mrs. Jollie; and Mr. Macgregor contents himself with a bed for himself, as I understand the evidence. Let me fairly say that Mary Hastie does not say expressly that Mr. and Mrs. Jollie, slept together in the same bed, but, she says, she gave them a bed, because a bed was asked for, *for Mr. and Mrs. Jollie*. According to the first marriage at Holytown, Mr. Macgregor and his lady, as she must be supposed then to be, according to his case, lie in different beds, when there could be no reason in the world why they should not follow the good advice of Doctor Macneill, for he must be taken so to advise if he had married them, by getting into the same bed; and then, after it is supposed she had been deliberately married to Mr. Macgregor, having taken a fancy to be married to Mr. Jollie, when they meet in October, 1816, Mr. Macgregor then does not sleep in one bed and she in another, but, according to all, that is the probable effect of this evidence, Mr. Macgregor sleeps in one bed, and Mr. and Mrs. Jollie in another; and that is to be taken in Scotland, which would not in England be taken to be proof of a deliberate consent, that Mr. Macgregor should be the husband of the lady and not Mr. Jollie.

My Lords, I will call your attention to another circumstance, Mr. Macgregor had been in some measure, or sort, employed as the man of business of Dr. Macneill. Dr. Macneill had made a provision for his daughter, this Mrs. Jollie, or

Mrs. Macgregor, according as your Lordships shall determine her to be, the one or the other; he had given her not the whole of his substance in the first instance; however, from a sense of duty to his natural child, he seems to have thought it was necessary to give her the whole of his substance, and he gives it her by deed. Those deeds were put into the possession of Mr. Macgregor, as I understand the case, and Mr. Macgregor might naturally enough think, that if he was to tell this story to Dr. Macneill, about this lady having first married him, with his consent at Holytown, and then married him again at Edinburgh, for the purpose of having no doubt left upon the effect of the Holytown marriage; and that she had then married Mr. Jollie afterwards, and in the Doctor's own presence, and given away by him, he might perhaps think that all the Doctor's good intentions, in favour of this lady, might be frustrated, if he told the Doctor of these most improper transactions on the part of his daughter, as they must be admitted to be, if Mr. Macgregor represents what were really the facts of the case. He is silent, as it is alleged, for some such reason until Dr. Macneill died. But, speaking the truth after a man is dead, will not enable him to act as if he was a living man. When, therefore, the Doctor was dead, does Macgregor claim his wife? No! he attends the funeral, where Mr. Jollie acts as chief mourner, and not Mr. Macgregor; after the funeral the deeds are called for, he delivers them himself; he is as a visitor of Mr. and Mrs. Jollie, as other friends visit Mr. and Mrs. Jollie, for some time; and he says nothing about this marriage, till about the

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month of December, 1817. Then, in that December, 1817, my Lords, he makes a claim of marriage; it has escaped me if the proofs establish an earlier claim. Permit me, my Lords, to say that, when I first read this case, I thought it a case so disgusting, with respect to the moral conduct of the Respondent, that nothing upon earth would have induced me to give my opinion upon it, whilst I was under those impressions. I therefore made a covenant with myself that no detestation of the conduct of this gentleman should influence my judicial mind; I trust and hope that it has not. I have nothing to do with the case, except merely as to the law of the case, as it applies to the established facts. My Lords, what he then does, is to state that he has a claim of marriage; and your Lordships know the nature of his claim, and he then lodges his summons, for the purpose of having a declarator of marriage, according to the prayer of the summons, that this virtuous lady, as he must think her, might be restored to his arms, that she might live happily with Mr. Macgregor, as Mrs. Jollie, or Mrs. Macgregor. But this claim is not brought forward till after those circumstances had taken place. Notwithstanding all that, it is your Lordships' duty, if, under these circumstances, you can believe that there really was a marriage constituted effectually, constituted upon the 23rd of May; it is your duty, notwithstanding all that, to say she must be restored to his arms; whether you ever will restore her to his arms I do not know, but I do not think your Lordships will readily make yourselves a party to that sort of business.

My Lords, my judgment with respect to this declarator goes upon this, that, regard being had to the nature of the evidence which you have, it appears to me there is no reason to believe that there was a free, deliberate, full, voluntary, solemn consent given, to constitute immediately the relation in law of man and wife, at the house of the priest Robertson; that there is no reason, from the proof, to believe that there was consummation. The circumstances go to shew there was no such consent; they are evidence that the marriage was not understood by this gentleman himself to be a binding and valid marriage. This appears clear from his conduct subsequent to it, as well as from his conduct prior to it; the whole tends to show no such consent was given, and although her story is improbable, it is not half so improbable as his story.

Under all the circumstances, admitting as I do the extreme danger that attends all questions about the dissolution of supposed marriages; looking, on the other hand, to it as a most important principle, that you should see that the most sacred relation of life is formed deliberately and fairly: upon the whole, I think the decision you ought to come to, (in all these cases you cannot, perhaps, be quite safe, all that you can do, is to be satisfied, when you pronounce judgment, that you are pronouncing the real effect of the proofs,) the best decision, in my opinion, is that which should lead you to reverse this interlocutor of declarator of marriage.

I will again repeat, that if this declarator of marriage should be supported, I still should entertain very considerable doubts indeed, whe-

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ther, regard being had to all the circumstances of this case, the Court of Session ought to have been permitted to proceed one step further, for the purpose of the ulterior object of this summons, without considering the point, whether, under such circumstances, they would, or would not, decern a restitution of conjugal rights. As to the fact of the alleged marriage itself, my opinion goes along with that which has been expressed by the noble Lord who has addressed the House, subject nevertheless to some consideration of the terms in which the judgment should be expressed, because nothing can be of greater importance, than that you should take care that, by the terms of the judgment, you do not prejudice any future case. I would, therefore, with your Lordships' permission, submit to you, that you should take some time to consider in what terms the judgment should be expressed; but, with respect to the substance, that this declarator of marriage ought not to be supported, I perfectly agree with my noble friend who has preceded me.

Upon another subsequent day, *Lord Eldon* said—My Lords, it has occurred to me, since I before addressed your Lordships, that I omitted to notice the evidence of the lapidary, White, and that of a witness of the name of Neill. I shall only now say, that after repeatedly considering the effect of the testimony of both those witnesses, and the effect of the observations contained in the different printed memorials and cases, in support of, and against their testimony, that testimony might render inaccurate some few expressions, to be found in what I had before the honor of stating

to your Lordships upon this case, yet that testimony does not, in any degree, in my judgment, authorise any change of opinion—that this reversal should take place.

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Order,
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Upon due consideration of all the proceedings in this action of declarator of marriage, at the instance of Malcolm Macgregor against Mary Black Macneill, particularly of the summons, dated 25th March, 1818, wherein the allegations set forth are—"That an irregular marriage was celebrated between the said Malcolm Macgregor and the said Mary Black Macneill, by Dr. Macneill, at Holytown, in spring, 1816, which was consummated by their spending several nights together in the same bed; and that they considered it proper on their return to Edinburgh, in the month of May, 1816, that no time should be lost in celebrating, in *facia ecclesiæ*, that marriage which had been irregularly celebrated between them; and, accordingly they were, in the month of May, 1816, regularly married by the Rev. Joseph Robertson, minister of the chapel in Leith Wynd, Edinburgh;" and upon examination of what has been established by evidence in the Courts below, with reference to the facts alleged in the said summons, this House is of opinion that there is no proof whatever of any marriage between these parties having at any time taken place at Holytown, or of any regular marriage, in *facie ecclesiæ*, having been celebrated between them at Edinburgh, in the month of May, 1816. And, further, this House, taking into consideration all the facts and circumstances proved in relation to

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the conduct of the parties, both before and after the 23rd of May, 1816, is of opinion that there is not evidence sufficient to justify the conclusion, that the said Mary Black Macneill, and the said Malcolm Macgregor, did on the 23rd of May, 1816, or at any other time, voluntarily and deliberately express that real mutual consent immediately to contract marriage, which, by the law of Scotland, is necessary to give validity to such an irregular marriage, as is alleged to have taken place. It is therefore ordered and adjudged, by the Lords spiritual and temporal, in Parliament assembled, that the said several interlocutors, complained of in the said appeal, be, and the same are hereby reversed; and that the farther proceeding in this action be, and the same is hereby remitted to the Court of Session, with instructions to give directions to the Commissary Court to dismiss the declarator of marriage raised at the instance of the said Malcolm Macgregor, by summons of date 26th of March, 1816, and to assolzie the defender, the said Mary Black Macneill, from all the conclusions thereof. And this House having so ordered and adjudged, doth not think it necessary to determine upon what has been submitted to its consideration, viz. Whether the several interlocutors, herein before mentioned, could have been deemed duly pronounced, in proceedings to which Robert Jollie, and the children of the defender, Mary Black Macneill were not parties?

The principal topics of argument in support of the judgment in the Court below, are comprised in the following speeches of the Lord President, on advising the case in the Court of Session.

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Lord President—This is a most distressing case. I shudder at the consequences of touching what may be considered a solemn marriage. Regular celebration is a matter of order, which, by removing doubts, gives certainty to consent. No woman of twenty-six years of age can doubt the purpose for which she goes before a minister, if she is not an idiot; and idiots are not capable of consent. I have great delicacy in touching a marriage so celebrated. It is said here, that the pursuer wishes the marriage declared, for the purpose of bringing a divorce; but if Mr. Macgregor makes her his wife, he can never get a divorce. Instantaneous repentance, after deliberate consent, will not dissolve a marriage. If such was the case, there would have been many instances in point. Look at the case of Mac Adam.* He was married at breakfast time. In the afternoon he blew out his brains. Here it was wished to dissolve the marriage, but the House of Lords would not hear of it. This might have been a rash marriage, but it was a regular one. I cannot believe there was concussion. If such existed, she would have shewn it. Macnaughton's evidence does not prove it. But from circumstances posterior to the marriage, Macgregor does not seem to believe he was married. It is a new case, and should be farther investigated, particularly as to Dr. Macneill's presence at Mr. Jollie's marriage. It is said, that the doctor not only consented to Macgregor's marriage,

* D, P. May, 1813, MSS.

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but that he knew it had taken place. If so, he was the most criminal of all, to connive at Mr. Jollie's marriage. I should wish to be of the opinion of Lords Hermand and Balgray, for the sake of the children; but even if the first marriage should be adopted, the *bona fides* of Mr. Jollie, in contracting the second, would perhaps protect them, although it would not do so on the other side of the water. I recollect something similar happened in Mr. Riddell's case,* but the child died before a decision. I had, however, then spoken to the late Lord Meadowbank on the subject, who concurred with me, in thinking that the child must be held to be legitimate. I am for remitting to the Commissaries, to take further proof upon every circumstance which can bear upon the case.

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Lord President†—I wish very much I could have taken the same view as my brother, considering that there are children of this marriage, and considering also, that Mr. Jollie seems to be the only person against whom there can be no reproach. As to both of the other parties their conduct is shameful.

There is no objection to Mr. Jollie's marriage; every thing was regularly and solemnly conducted, and there can be no doubt it would be a good marriage if it had not been vitiated by a previous marriage, but that is the question: And, therefore, what does the Pursuer say as to Mr. Jollie's marriage, which did not take place till the 14th of June? that on the 23rd May preceding he was married by the Reverend Joseph Robertson; Mr. Robertson was at that time an ordained minister of the gospel, and was entitled by the law of the church and state to marry. The Pur-

* Reported by Bell.

† After the remit.

suer produced marriage lines from the session clerk of Edinburgh, and the witnesses to the marriage were Mrs. Robertson, and her daughter. No doubt there might have been a deficiency in the evidence, for, although both the wife and the daughter recollect a marriage, they might have been mistaken about the lady; but unfortunately, that is supplied by the lady herself, for the Defender acknowledges it. It is true Mr. Joseph Robertson may have turned out not so respectable a character, but as to his capability of celebrating a marriage he was just as fit as the other. The parties were thus married *in facie ecclesiae*, in both the marriages, but in both of them without actual proclamation of banns; neither of them were regular; the one was just as irregular as the other.

But the Defender says she was forced into the first marriage; that no consent was given by her; that no consummation followed, and that the Pursuer knew she was engaged to Mr. Jollie. All this may be true; but has she proved either deceit, threats, or force? Is there the slightest evidence of it? She says the Pursuer asked her in the evening to go to Mr. Bridges, that he had led her to Mr. Robertson's, and, under threats of burning the settlements, and murdering Mr. Jollie, he frightened her to go in. There is no evidence of all this; where did it happen? Was it on the height of Lammermuir, where she could get no assistance? No, this took place in a summer evening, in the end of the month of May. When there was good day light, she is led through the streets of Edinburgh under threats of burning her father's deeds, and murdering her sweetheart;

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was there no person near to protect her and take her part? Surely, when she got into Mr. Robertson's house she was under protection; she could at least have told him of the threats that had been used against her, and desired him to send for a constable; but she says nothing; she does not even object to the ceremony; she is no child at the time; she was twenty-six years of age. There is no evidence of all this alleged force and threats, and, to me, it is quite incredible, that all this could have taken place in day light in a summer evening and in the streets of Edinburgh.

Then, what happens afterwards; they walked home together; they sleep at least in the same house together. It is true there is no evidence that consummation did take place, and you will presume it the more that this lady slept in the same room with him only a few days before. It would have been more suitable if, on that occasion, she had slept in the same room with her father; there might have been some indelicacy in this, but at least there would have been no impropriety, and where there was such a scarcity of rooms, it would have been more proper that she had slept in the room with her father, instead of that of a stranger; therefore, I cannot take it off her hands that there was no consummation, but at all events they walked home together arm in arm.

No doubt it is true that both parties seem afterwards to have repented of the marriage, but repentance however soon it follows consent will not do. In one case there was the most tremendous symptoms of repentance in the case of McAdam. In that case there was only an acknowledgment before servants, much less solemn than in the

presence of a clergyman, as to which no person in their senses could doubt of the object in view, no mortal can be mistaken; but in that case it was found both in this Court and the House of Lords, that the most instantaneous repentance could not undo the marriage. Therefore the repentance of the first marriage, and the consent to the second, will not do.

I will not say and I have no occasion to say that the consent before a clergyman is to be held as *proptio probata*. But this I will say, that there is no case where the consent before a clergyman was found not to constitute a marriage, except these two cases of the children, where they did not come before the clergyman for the purpose of being married, but where when the mother was out of the room the marriage was performed, and the girl was taken away by the mother before it was published, so that there was no consummation.

The only thing at all corroborative of the Defender's story, is the fact, that he was possessed of Dr. Macneill's settlements; but then his answer is just as good, that it was in consequence of the marriage that the Doctor gave him possession of them. And then there is another incomprehensible part of the story, that is, what took place at Mr. White's, the lapidary. Dr. Macneill was present on that occasion, and Mr. White drank to his daughter's health as Mrs. Macgregor, and no objections are stated. Then something took place about presents, upon which the Doctor said to Mr. Macgregor, "It will all be your's"; which corroborates the story, not only of their being married, but of his knowing of, and being entrusted with the settlements.

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The only thing that would have weighed, and weighed strongly, in my mind, if this first marriage had been constituted in any other way than in *facie ecclesiæ*, for you will observe that all the clergymen say, that they never saw a case where the marriage lines were not delivered to the lady, but Joseph Robertson gave the marriage lines on this occasion to Macgregor himself. The object of giving the lines to the lady is, that she may have the proof of the marriage in her own possession, and in that case there can be no want of evidence of consent; but in this case it was of less consequence, because the lady could have recourse to the evidence of Mr. and Mrs. Robertson, and their daughter. In this case, the evidence is completely supplied.

There can be no doubt that the Pursuer's conduct is most extraordinary, and most unjustifiable. He saw what was going on with Mr. Jollie; he delivered up the title deeds to him; he allowed Mr. Jollie to act as chief mourner at Dr. Macneill's funeral; he went to church with Mr. and Mrs. Jollie; he sat in the same pew with them. In short, he has been guilty of the most gross lenocinium that can well be imagined, and sure I am that, under such circumstances, he will never be able to get a divorce.

I wish I could separate this second marriage, which was every way regularly conducted, so as to give effect to it. But this I cannot do, and considering all the circumstances, I regret I can not do it. But the first marriage being constituted, by what appears to me to be a legal consent, nothing on earth can dissolve it, except a divorce, which this man, I think, will never be able to obtain.

SCOTLAND.

(COURT OF SESSION.)

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JAMES PATTISON, and others - - *Appellants.*WILLIAM MILLS, and others - - *Respondents.*

A. and C^o. carrying on business in England as an Insurance Company, had an office and an agent in Scotland, with whom C. D. &c. for themselves and others, as joint owners of a vessel, made an insurance, receiving from the agent a memorandum in general terms, importing, without exception of any sea risks, that the vessel was insured, and that a policy would be prepared and sent to be delivered to the assured, or their order, "on the third Monday in the ensuing month, or on any subsequent day." Notice of the effecting of the insurance was transmitted by the Scotch agent to the principals in London, who, two months after the date of the memorandum, transmitted to the agent a policy of insurance, containing a clause, by which the operation of the policy was to be suspended while the vessel should be at sea. This policy was not demanded by, nor delivered, nor shewn to the assured, who at the end of the year renewed their policy by the medium of the agent in Scotland, but by a memorandum of renewal, signed by the agent in England, and referring to a specific policy, which although it was lying at the agent's office, was not then demanded by, nor delivered or shewn to the assured. Soon after this renewal of the policy, the ship was lost at sea by fire. Under these circumstances, a judgment of the Court of Session, reversing a sentence of the Judge-Admiral, was affirmed on appeal, but on distinct grounds, the House of Lords being of opinion, that the memorandum was the contract between the parties, and therefore properly admitted in evidence, upon the trial of an issue directed before the Jury Court; that the stat. 6 Geo. I. c. 18, so far as relates to Insurance Companies, did not extend to Scotland; that a contract made under the circumstances above stated, was a Scotch contract; and that the principals and their agents were properly included in the same action.

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THE Appellants in this case represented the Albion Fire and Life Insurance Company. The Appellant, Warner Phipps, being the Secretary to the Company in London, and the Appellant, Thomas Hamilton, being their Agent at Glasgow, but neither Mr. Phipps nor Mr. Hamilton were Proprietors. The other Appellants were Directors of the Company and Proprietors. They carried on their business in London, where their policies were invariably executed, and all the Appellants were resident in London, excepting Thomas Hamilton.

The Respondents were the Proprietors of a Steam Boat called the Robert Bruce.

In the month of July, 1820, the Respondent William Mills, (being then the managing owner of the steam boat called the Robert Bruce, and of another steam boat called the Superb,) in the name of himself and others of the Respondents, but as the agent, and for the benefit of all the Respondents, applied to the Appellant Thomas Hamilton, as agent in Glasgow for the Albion Company, to effect an insurance to the extent of 3000*l.* on each of the said steam boats, and to have certain policies cancelled which had been theretofore effected by individual owners on their respective shares.

Upon the occasion of effecting this insurance with Thomas Hamilton, a memorandum or certificate was delivered to the Respondent William Mills, by the Appellant Thomas Hamilton, of the tenor following—

“ Albion Fire and Life Office, Glasgow, 4th
“ July, 1820.—James Dennistoun, William Mills,

“ Colin Arrot, James Moffat, John T. Alston,
 “ Esquires, as a committee of management for
 “ themselves and others, having this day effected
 “ an insurance of 6000*l.* with the undersigned,
 “ on behalf of the Albion Fire and Life Insurance
 “ Company of London, on the property specified
 “ in the check corresponding with this memo-
 “ randum ; a policy will be forthwith prepared at
 “ the office in London, for the said insurance, and
 “ such policy will be delivered to the assured, or
 “ to his, her, or their order, on the third Monday
 “ in the ensuing month, or on any subsequent
 “ day. (Signed) P. THOMAS HAMILTON,
 “ Agent for the Company.”

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The proposed insurance being accepted by the directors, a policy of insurance was made and executed in London, on the 11th of September, 1820, containing a stipulation that the insurance was to be suspended, and remain out of force during the time the boat might be at sea.

The policy was never applied for by the Respondents until after the loss of the Robert Bruce, but it was transmitted from London soon after it was executed, and was lying in the office of Thomas Hamilton at Glasgow.

In June 1821, the Respondent William Mills, (in the name and on the behalf of himself, and the other Respondents,) renewed for another year the insurance effected on the Robert Bruce and the Superb. The premium was paid to the Appellant Thomas Hamilton, who delivered to the Respondent William Mills, a memorandum or certificate in the following terms, subscribed by the Appellant Warner Phipps, as secretary of the Company.—

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“ Albion Fire and Life Office, London, Mid-
“ summer, 1821.—Renewal Certificate on Fire
“ Policy, No. 56,978, insuring 6000*l.* to James
“ Dennistoun, William Mills, Colin Arrot, James
“ Moffat, and John Thomas Alston, Esquires.”

“ One Year's Premium.....£31 10
Duty 9 0

Total Payment..£40 10

“ 4000*l.* insured with Eagle Com- }
pany per Policy, No. 61,725, } 27 0
Premium and Duty }

£67 10

“ 1821.—This is to declare that the above
“ Policy has been renewed, and that the insurance
“ granted thereby will continue in force from the
“ 24th of June, 1821, to the 24th of June, 1822.

“ (Signed) WARNER PHIPPS, Secretary.”

On the 28th of August, 1821, the Robert Bruce
was destroyed by fire at sea, while on a voyage
from Liverpool to Dublin.

Application was then made by the Respondents
at the office of the Appellant Thomas Hamilton;
for payment of the sum insured on the Robert
Bruce, and upon that claim being resisted by the
Appellants, the Respondents required a policy,
framed in the terms in which they contended that
it ought to have been executed, to be delivered
to them. Upon this application, a policy except-
ing the risk of loss by fire at sea, was tendered
to the Respondents, but they refused to accept
it, insisting they were entitled to have a policy
without any exception of risk by fire while the
boat might be at sea, and upon a policy of that
unlimited nature being refused, they raised their

action against the Appellants in the High Court of Admiralty in Scotland, concluding that the Defenders ought, and should be decerned and ordained conjunctly, and severally by decret of the Judge of the said High Court of Admiralty, immediately to furnish and deliver to the Pursuers a valid and effectual policy of insurance upon the said steam boats or packets for the said sum of 6000*l.* sterling, and that for the period of one year from the 24th day of June then last 1821, when the premium therefor was paid, and containing in the said policy, the usual clauses, and an obligation of insurance against the usual risks as before specified, and among others an insurance against the risk of damage occasioned, or which might be occasioned, to the said steam boats or packets by fire, at any time and any where during the period aforesaid of the insurance, and whether such policy should be furnished and delivered to the Pursuers or not, or in whatever terms they might express or had expressed the same, they the said Defenders should be decerned and ordained by decret foresaid, conjunctly and severally to make payment to the Pursuers of the foresaid sum of 3000*l.* sterling, being the sum insured upon the said steam boat or packet, Robert Bruce, with lawful interest, &c.

The Appellants put in defences amounting in substance to a denial that they had ever undertaken the insurance upon the terms alleged, and further contending that such an undertaking even if made, would have been void in law by the operation of the statute* 6 Geo. I. c. 18; by the

* The act giving a monopoly of insurance to the Royal Exchange and London Assurance Companies which is repealed, so far as relates to the monopoly, by 5 Geo. IV. c. 114.

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12th section of which act it was enacted, " That
" from and after the granting or making of the
" said respective charters or indentures for erect-
" ing the two Corporations before mentioned, and
" passing the same under the said Great Seal,
" for and during the continuance of the same
" Corporations respectively, or either of them,
" all other Corporations or Bodies Politic before
" this time erected or established, or hereafter to
" be erected or established, whether such Corpo-
" rations or Bodies Politic, or any of them, be
" sole or aggregate, and all such societies and
" partnerships as now are, or hereafter shall or
" may be entered into by any person or persons
" for assuring ships or merchandizes at sea, or
" for lending money upon bottomry, shall by
" force and virtue of this act be restrained from
" granting, signing, or underwriting, any policy
" or policies of assurance, or making any con-
" tracts for assurance of or upon any ship or ships,
" goods or merchandizes at sea, or going to sea,
" and from lending any monies by way of bot-
" tomry as aforesaid, and if any Corporation or
" Body Politic, or persons acting in such society
" or partnership, (other than the two Corporations
" intended to be established by this act, or one
" of them,) shall presume to grant, sign, or
" underwrite, after the 24th of June, 1720, any
" such policy or policies, or make any such con-
" tract or contracts for assurance of or upon any
" ship or ships, goods or merchandizes at sea or
" going to sea, or take or agree to take any pre-
" mium or other reward for such policy or
" policies, every such policy and policies of
" assurance of or upon any such ship or ships,

" goods or merchandizes, shall be *ipso facto* void,
 " and all and every sum and sums so signed or
 " underwritten in such policy or policies shall be
 " forfeited, and shall and may be recovered, to
 " wit, one moiety thereof to the use of His
 " Majesty, his heirs and successors, and the other
 " moiety thereof to the use of such person or
 " persons as will inform or sue for the same in
 " any of His Majesty's Courts of Record at
 " Westminster, in which action, suit or informa-
 " tion, no essoin, protection, privilege, wager of
 " law, or more than one imparlance shall be
 " granted or allowed. And if any Corporation
 " or Body Politic, or persons acting in such
 " society or partnership as aforesaid, other than
 " the two Corporations intended to be established
 " by this act, or one of them shall presume to
 " lend, or agree to lend, or advance by them-
 " selves, or any others on their behalf, after the
 " said 24th of June, 1720, any money by way of
 " bottomry as aforesaid, contrary to this act, the
 " bond or other security for the same shall be
 " *ipso facto* void, and such agreement shall be
 " adjudged to be an usurious contract, and the
 " offenders therein shall suffer as in cases of
 " usury. Nevertheless it is intended and hereby
 " declared, that any private or particular person
 " or persons shall be at liberty to write or under-
 " write any policies, or engage himself or herself
 " in any assurances of, for, or upon any ship or
 " ships, goods or merchandizes at sea or going to
 " sea, or may lend money by way of bottomry as
 " aforesaid, as fully and beneficially as if this act
 " had never been made, so as the same be not
 " upon the account or risque of a Corporation or

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“ Body Politic, or upon the account or risque of
 “ persons acting in a society or partnership for
 “ that purpose as aforesaid: any thing herein
 “ contained to the contrary notwithstanding.”

The Judge Admiral by an interlocutor bearing date the 16th of May, 1822, repelled the defence founded on the statute 6 Geo. I. c. 18; but subsequently on advising a petition for the Appellants, the Judge Admiral superseded consideration of the defence on the statute. The Judge Admiral afterwards assoilzied the Appellants from the action, on the ground that the insurance undertaken by the Appellants did not extend to loss at sea, but he found the Appellants entitled to no costs.

The case was thereupon removed into the Court of Session by mutual process of reduction of the decree of the Judge of the High Court of Admiralty—the Appellants insisting they were entitled to costs—the Respondents that judgment ought to have been given for them (the Respondents,)—and the Respondents’ summons of reduction, after praying that the Judge Admiral’s interlocutors against them should be reduced; retracted, rescinded, cassed, annulled, decerned and declared null, &c. concluded (in the same terms as the process in the Admiralty Court,) that the Defenders (Appellants) ought to be decerned and ordained to deliver a policy for a year from the 24th of June, 1821, without any exception of risk by fire at sea, and whether such policy should be so delivered or not, that they ought to be decreed and ordered to pay the sum stated to be insured, viz. 3000*l.* with costs, &c.

Memorials and condescendences and revised

condescendences were presented and put in on each side. In the memorial for the Appellants, they stated the act of 6 Geo. I. c. 18, as incapacitating them from undertaking an insurance against loss at sea, and relied also on circumstances before referred to, and other particulars; as shewing that in point of fact they had not undertaken an insurance against such a loss.

The memorial and condescendence presented and put in on the part of the Pursuers, (Respondents) set forth a variety of matters with a view of proving that when they effected their insurance on the Robert Bruce, they supposed they were effecting an absolute insurance without exception of sea risk.

On the 13th of May, 1826, the second division of the Court of Session pronounced a special interlocutor, by which "having resumed consideration of the conjoined actions and proceedings therein, with the condescendences, revised condescendences, and answers for Thomas Hamilton, they remitted the actions to the Jury Court, to be there proceeded with according to the statute."

The following issue was adjusted by the Jury Court for the trial of the cause, which was directed to be tried at Glasgow.

"It being admitted that on the 27th or 28th days of August, 1821, the steam vessel called the Robert Bruce, the property of the Pursuers, was destroyed by fire while at sea, on her voyage betwixt Liverpool and Dublin; whether the Defenders promised and agreed to insure the Pursuers to the extent of 3000*l.* or about that sum, from loss and damage which might

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“ be caused by fire to the said steam vessel
 “ while at sea as aforesaid; and whether the
 “ Defenders have failed to perform the said pro-
 “ mise and agreement to the loss and damage of the
 “ Pursuers. Damages laid at 3000*l*. (Signed)
 “ WILLIAM ADAM, Lord Chief Commissioner.”

The issue was tried before the Lord Chief Commissioner, at Glasgow, on the 20th day of September, 1826, when a general verdict was found for the Pursuers, subject to a bill of exceptions, which after stating the issue, &c. proceeded thus: And, upon the trial of the said issue, the counsel learned in the law for the said Pursuers, to maintain and prove his case under the said issue, did offer to give in evidence, certain certificates or receipts, being eight in number, the same having been formerly given by the said Thomas Hamilton, as such agent as aforesaid, to the several individuals (whereof six only are parties to the present action) on occasion of those eight individuals effecting each one a several insurance with the said Company upon his several share and interest in the said ship, for the year from the 14th of August, 1819; to the 29th of September, 1820; of which said certificates or receipts, one was and is in the following or similar terms: “ Albion Fire and Life and Office, Glas-
 “ gow, 14th of August, 1819. William Mills, Esq.
 “ having this day effected an insurance of 200*l*.
 “ with the undersigned, on behalf of the Albion
 “ Fire and Life Insurance Company of London,
 “ on the property specified in the check corres-
 “ ponding with this memorandum, a policy will
 “ be forthwith prepared at the office in London
 “ for the said insurance, and such policy will be

" delivered to the assured, or to his, her, or their
 " order, on the third Monday in the ensuing
 " month, or on any subsequent day.

" (Signed) *Pr.* THOS. HAMILTON, Agent for
 " the Company, ROBERT MITCHELL."

" Premium £1 4 6

" Duty 0 7 0

£1 11 6

" Insured up to the 29th of September, 1820."
 And on the back of which said certificate or
 receipt there was and is the following indorse-
 ment:

" This receipt insures, viz. on the Robert
 " Bruce steam-boat, at present plying between
 " Glasgow and Liverpool, 200/.

" (Signed) *P.* THOS. HAMILTON, R.M."

And the remainder of which said certificates
 or receipts, so offered in evidence as aforesaid,
 were and are in the same or similar terms. And
 the said Counsel for the said Pursuers, in further
 maintenance of the said issue on the part of the
 said pursuers, did further tender and offer in
 evidence a letter, dated the 31st of August, 1819,
 from the said Thomas Hamilton, the said Defen-
 der, and agent for the said Company at Glasgow,
 to Warner Phipps, Esq. London, secretary to the
 said Albion Fire and Life Insurance Company of
 London, Defenders aforesaid, and a letter in
 answer thereto, from the said Warner Phipps,
 dated the 3d of September, 1819, to the said
 Thomas Hamilton, respectively written and sent
 on occasion of effecting the said insurance referred
 to in the said certificate: From which said letters
 the Counsel for the Pursuers proposed to offer in

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evidence as aforesaid excerpts in the terms following; that is to say: "I have this day sent, per mail-coach, a parcel containing commission account and account-current; and inclosed you will receive bills for the balance at the credit of the Company, amount 1215*l.* 6*s.* 5*d.*

"The parcel contains also twenty fire orders, fire renewal sheet for August, Midsummer, and life renewal sheet for August, amount to the credit of the Company, as noted below; also order on Eagle Company for 8*l.* 10*s.*

"I am not disposed to think that the insurers of the Robert Bruce steam-boat, as per fire-orders No. 14. to 22, inclusive, excepting No. 21, will be satisfied with the introduction of the clause, 'but not while the same shall be at sea.' I think that, in addition to the rivers, the channel ought to be admitted, as this vessel is expressly to ply between Clyde and Liverpool, and will be a great part of her time in the channel."

And which said answer of the said Warner Phipps, was offered in evidence as aforesaid, and is in the terms following, that is to say:

"In answer to your remarks respecting the clause which exempts the Company from loss on steam-boats while at sea, I have to state that it is a point in which we have no choice. The Royal Exchange and the London Assurance are the only Companies which have a right, as Companies, to undertake insurances on vessels while at sea, and no other Company can lawfully undertake such risk. If, therefore, the Proprietors of the Robert Bruce are not content to hold our policies with the exception

“complained of, I will thank you to advise me,
“and we shall then, of course, consider the
“insurance not to be renewed after the present.”

To the admissibility of all which certificates and letters, or excerpts therefrom, being given in evidence, the Counsel learned in the law for the said Defenders did object, as not legal or competent matter to be given in evidence in maintenance of the issue on the part of the said Pursuers. But the said Lord Chief Commissioner did then and there deliver it as his opinion, that the certificates and letters were legal and competent evidence in maintenance of said issue; and did allow the same to be produced, and given in evidence on the part of the said Pursuers. And the said Counsel for the said Pursuers, in maintenance of the said issue, did propose to give in evidence a certificate and receipt dated the 4th of July, 1820, granted by the said Thomas Hamilton, agent as aforesaid, at the time of receiving the order to obtain a policy of insurance from the said Company on the said steam vessel; which said certificate was and is in the terms following, that is to say:

“Albion Fire and Life Office,—Glasgow, 4th
“of July, 1820.—James Dennistoun, William
“Mills, Colin Arrott, James Moffat, and John T.
“Alston, Esqrs. as a committee of management,
“for themselves and others; having this day
“effected an insurance of 6000*l*. with the under-
“signed, on behalf of the Albion Fire and Life
“Insurance Company of London, on the property
“specified in the check corresponding with this
“memorandum, a policy will be forthwith pre-
“pared at the office in London for the said

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“ insurance, and such policy will be delivered to
“ to the assured, or to his, her, or their order, on
“ the third Monday in the ensuing month, or on
“ any subsequent day.

“ (Signed) P. THOMAS HAMILTON, Agent for
“ the Company, ROBERT MITCHELL.

“ Premium..... £31 10 0

“ Duty 9 0 0

£40 10 0”

And the said Counsel for the said Pursuers, in further maintenance of the said issue, on the part of the said Pursuers, proposed to give in evidence a policy of insurance, of date the 11th of September, 1820, numbered 56,978, made by the said office in pursuance of the said last mentioned certificate or receipt; and which policy of insurance was and is in the following terms:

“ Whereas James Dennistoun, William Mills,
“ Colin Arrott, James Moffat, and John T. Alston,
“ Esqrs. of Glasgow, as a committee of manage-
“ ment, for themselves and others, have paid to
“ the Albion Fire and Life Insurance Company of
“ London, the sums above stated to have been
“ received on the grant of this policy, for pre-
“ mium and duty, and have agreed and conditioned
“ to pay, or cause to be paid to the said Company,
“ from time to time, at its house in New Bridge
“ Street, London, or to some one of its accredited
“ agents, the sums above stated to be in future
“ due, for the renewal or continuance of this
“ policy, at the period or periods also above
“ stated. Now, be it hereby known, that from
“ the 30th day of June, 1820, and so long as
“ such future payments so conditioned to be made

" shall be made, and the directors of the said
 " Company for the time being, shall agree to
 " accept such payments; the capital stock, and
 " the funds of the said Company, shall be sub-
 " ject and liable to pay, and make good to the
 " person or persons abovementioned, and by
 " whom such payment is so acknowledged to
 " have been made, or to his, her, or their heirs,
 " executors, or administrators, all such loss or
 " damage, as the said person or persons so assured
 " shall suffer by fire on the property herein after
 " described, not exceeding in the whole the sum
 " of 6000*l.* sterling, and not exceeding in any
 " case, the sum which shall be specifically stated
 " against the property herein after described;
 " that is to say, 3000*l.* on the steam boat ' Robert
 " Bruce,' including machinery and apparatus be-
 " longing thereto, now plying as a passage boat
 " between the Clyde and Liverpool, and 3000*l.*
 " on the steam boat ' Superb,' including ma-
 " chinery and apparatus belonging thereto, and
 " now plying as a passage boat between the
 " Clyde and Liverpool.—N.B. It is agreed that
 " the said boats shall have liberty to lie or ply in
 " any port, harbour, river, dock, or navigable
 " canal in the United Kingdom of Great Britain
 " and Ireland, but that the insurance by this
 " policy shall be suspended, and remain out of
 " force, as regards either of the said boats, during
 " the time she may be at sea.—1600*l.* are insured
 " on each of the above mentioned steam boats,
 " with the Eagle Insurance Company."

" Memorandum,—It being the intencion of this
 " Company, that only one of its policies shall be
 " in force at any one time, in favour of the same

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“ person or persons on the same property, it is
“ declared, in the case of any former insurance
“ having been granted by the Company to the
“ person or persons herein named, on the property
“ above described, that this policy shall not take
“ effect, until such former insurance shall have
“ ceased, or shall be given up. The unexpired
“ value of former policies may be at all times re-
“ ceived in aid of new insurance. It is farther
“ expressly declared, that this policy shall be
“ valid only on the condition of the former poli-
“ cies of the said Company, No. 54,600, 54,601,
“ 54,602, 54,603, 54,604, 54,605, 54,606, 54,608,
“ 54,611, and 55,107, being held to be cancelled
“ and made void.”

And it was further proposed by the Counsel for the said Pursuers, to prove, in support of the said issue, that the said policy of insurance was not transmitted by the said Defenders, the Albion Company, to the said Defender Thomas Hamilton, their agent, until the month of December, 1820; and that the said policy, regularly executed, was then transmitted to Glasgow, to the said Thomas Hamilton, in pursuance of the said order of insurance, and was, at the date aforesaid, in said office at Glasgow, ready for delivery, and that the same was not sent for by the said Pursuers; nor did the said Thomas Hamilton send the said policy to the Pursuers, but that it remained in the office of the said Thomas Hamilton, and was not delivered prior to the loss of the said vessel, but offered, when demanded, under protest, on 3d September, 1821.

And the said Counsel for the Pursuers did further, in order to maintain the said issue, give in

evidence a certificate or receipt, dated London, Midsummer, 1821, given by the said Thomas Hamilton to the said William Mills; which said certificate or receipt was and is in the following terms; that is to say: "Albion Fire and Life Office, London, Midsummer, 1821,—Renewal certificate on fire policy No. 56,978, insuring 6000*l.* to James Dennistoun, William Mills, Colin Arrott, James Moffat, and John T. Alston, Esquires."

| | | |
|---|-----|----|
| "One year's premium, 3 <i>l.</i> 10 <i>s.</i> } | £40 | 10 |
| duty 9 <i>l.</i> total payment } | | |
| "4000 <i>l.</i> insured with the Eagle } | £27 | 0 |
| Company, per policy No. } | | |
| 61,725, premium and duty . . } | | |

£67 10

"This is to declare, that the above policy has been renewed, and that the insurance granted thereby, will continue in force from the 24th June, 1821, to the 24th June, 1822."

"(Signed) WARNER PHIPPS, Secretary."

And the said counsel for the said pursuers, in further maintenance of the said issue on their part, did propose and offer to give in evidence, by Peter Gillies, clerk of the said pursuer William Mills, that in the month of June or July 1820, and in July 1821, conversations took place in his, the witness's, presence, between the said William Mills, acting for himself, and as the agent and manager for the other pursuers, and Robert Mitchell, clerk of the said Thomas Hamilton, defender, he the said Robert Mitchell acting for the said Robert Hamilton in the insurance in question, that the said conversations related to

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the terms or conditions of the aforesaid proposal to insure, and to renew the insurance on the said Robert Bruce steam-boat, for the year from the 24th day of June, 1820, to the 24th day of June, 1821, and from June 1821 for another year; and that in the said conversations no allusion was made by the said Robert Mitchell as to the risk being limited in any way on the said Robert Bruce steam-boat.

And in further maintenance of the issue aforesaid, and for the purpose also aforesaid, the said counsel for the said pursuers did further offer to give in evidence, by the testimony of the said Peter Gillies, that a certain other conversation was had, in his presence, in July 1821, between the said William Mills and the said Robert Mitchell, acting as aforesaid, viz. that at the time when the said certificate of renewal was so given as aforesaid, and that in such last-mentioned conversation nothing was said about a limitation of the insurance as to sea risk. To the admissibility of which said evidence respecting the said conversations, the counsel of the said defenders did then and there object, as not legal or competent evidence in maintenance of the said issue on the part of the said pursuers. But the said Lord Chief Commissioner did then and there deliver it as his opinion that the same was legal and competent evidence to maintain the said issue; and the same evidence was accordingly then and there admitted and received on the part of the said pursuers. And the said counsel for the said pursuers, in further maintenance of the said issue, did further propose and offer to give in evidence, that the premium paid to the Albion

Fire and Life Insurance Company, for insuring steam-vessels against risk of fire at sea, was 10s. 6d. per cent. which was equal to the rate of premium proved to have been paid in certain other cases for such insurance at the time of ordering the insurance in question. To the admissibility of which said evidence, the said counsel for the said defenders did then and there object. And the said counsel for the said pursuers did further propose to give in evidence, that the practice of agents in Glasgow for English and Scottish insurance companies, including the agents for the defenders, the Albion Company, is, to send the policies effected at those offices to the assured, as evidence to shew, that it was in like manner the duty of the said defenders, the said Albion Company, or of the said Thomas Hamilton, as their agent, to have sent the said policies so effected with them as aforesaid to the said assured. To the admissibility of which said evidence the said counsel for the said defenders did then and there in like manner object, as not being legal or competent evidence on the part of the said pursuers in maintenance of the said issue. But the said Lord Chief Commissioner did then and there deliver it as his opinion, that the said several matters so proposed and tendered in evidence for the purposes aforesaid, and so objected to as aforesaid, were fit and competent to be given in evidence under the said issue: and then and there allowed the same to be, and the same were accordingly given in evidence in that behalf. And the said counsel for the said defenders did then and there insist, before the said Lord Chief Commissioner, that all the said parole evidence

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so allowed to be given, and the certificates and letters, or excerpts thereof, so allowed, to be produced and read on the part of the said pursuers, and so objected to by the said counsel for the said defenders, should not have been left to the Jury, or referred to their consideration, because the aforesaid parole and written evidence admitted to be given as aforesaid, was not evidence admissible in law to maintain the case under the said issue.

And the said counsel for the said defenders did then and there request the said Lord Chief Commissioner so to direct the said Jury; but his Lordship did then and there deliver it as his opinion to the said Jury, that they might and ought to consider the same as legal evidence to be weighed by them in considering the agreement and promise, and failure of performance of the same, in the said issue contained.

And it was then and there admitted, by and on the part as well of the said pursuers as of the said defenders, that the said Albion Fire and Life Insurance Company, during all the time herein mentioned, was a certain company carrying on the business of insurers against loss by fire at London, and that the said several defenders, (excepting the said Thomas Hamilton, the agent at Glasgow of the said company,) were respectively resident in London; that the said company, by means of agents in Scotland and elsewhere, was and is in the habit of insuring property in those places respectively; but that all the instruments of policies of insurance hereinbefore insisted upon, made and entered into by the said company, were executed by or on the part of the said company in London, and not elsewhere.

And the said counsel for the said defenders did then and there also insist, before the said Lord Chief Commissioner, that even if legal and competent evidence had been given before the said Jury, whereby to prove that the said defenders (the said Albion Company) did promise and agree, as in the said issue mentioned,—still that, by a certain act of Parliament made and passed in the sixth year of the reign of King George the First, entituled ‘ An act for better securing,’ &c. such promise and agreement would be illegal and void, and that the said pursuers could not maintain any action thereon, and that the said Jury should be directed to find a verdict for the defenders. But the said Lord Chief Commissioner did nevertheless direct the said jury, if they were satisfied that the evidence admitted to be given on the part of the pursuers was sufficient to support the said promise and agreement in the said issue mentioned, that they should find a verdict for the said pursuers; whereupon the counsel for the defenders did tender their exceptions to the said direction, and did insist, that, under the provision of the said statute, the pursuers could not maintain the said action, and, therefore, the said Jury should have been directed to find a verdict for the defenders.

The said counsel for the defenders did also then and there submit, and humbly insist before the said Lord Chief Commissioner, that if the said evidence were sufficient to warrant the Jury in finding a verdict for the said pursuers,—still that the said Jury should not be directed to find a general verdict against all the defenders, but only against the said Albion Company, the prin-

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cipals, or else against the said Thomas Hamilton, the agent; and then and there requested the said Lord Chief Commissioner so to direct the said Jury. But he, the said Lord Chief Commissioner, did, then and there, deliver it as his opinion, to the said Jury, that, if their verdict should be in favour of the pursuers, to find against all the defenders generally; to which the counsel for the defenders excepted, insisting that the Jury should have been directed to find either against the Albion Insurance Company, or against Thomas Hamilton, as aforesaid.

And the said Jury then and there delivered their verdict in favour of the pursuers, and against all the defenders; but the counsel for the defenders insisted that the verdict should have been in favour of the defenders, inasmuch as the said several matters admitted to be given in evidence under the said issue were not in law admissible, and ought not to have been referred to the consideration of the said Jury; and that the several other matters herein before set forth, as admitted and given in evidence respecting the residence of the said Albion Insurance Company, the defenders, in respect to the execution of all the said instruments and policies of insurance, were a bar to the said action, by virtue of the statute of the 6th Geo. I, herein before-mentioned: and farther, that the said Jury should not have been directed to find a verdict against all the defenders. And the said counsel for the said defenders, did then and there propose the aforesaid exceptions to the directions aforesaid of the said Lord Chief Commissioner, and did request

him to sign the said Bill of Exceptions according to the form of the statute in such case made and provided; and thereupon the said Lord Chief Commissioner did sign the said Bill of Exceptions, on the 21st day of June, 1827, in the eighth year of the reign of his present Majesty.

The Jury found the issue in the affirmative, and returned a general verdict for the Pursuers (Respondents) against all the Defenders (Appellants).

The exceptions taken by the Appellants' counsel were put in the form of a Bill, as hereinbefore set forth, which was afterwards duly signed by the Lord Chief Commissioner according to the statute.

The Bill of exceptions, having been allowed and remitted to the Second Division of the Court of Session, came on to be argued before the Court on the 11th July, 1827, when the exceptions were disallowed by the Court, who then pronounced the following Interlocutor:—"The
 " Lords having heard counsel for the parties in
 " terms of their former deliverance, disallow the
 " exceptions, and declare the verdict final and
 " conclusive in terms of the statute; find the
 " Pursuers entitled to the expence of this discussion; allow an account thereof to be put in,
 " and remit the same when lodged to the Auditor
 " of Court to tax and to report, reserving all
 " other questions of expences."

This is one of the Interlocutors against which the present appeal was instituted.

On the 22d of December, 1827, the Court by Interlocutor approved of the Auditor's account

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of expences, by which the Pursuers (Respondents) costs were taxed at 67*l.* 18*s.* 7*d.*

This Interlocutor is also included in the appeal.

The Appellants then moved the Court of Session to pronounce judgment upon the defence raised by them under the Statute 6 Geo. I, cap. 18, which on the discussion of the Bill of Exceptions they had considered to be a question not properly raised at the trial, but reserved for the consideration of the Court of Session after the remit to the Jury Court was exhausted by the trial of the question. After hearing the counsel for both parties, the Court, on the 20th of December, 1827, appointed the parties to give in mutual cases. On the 22d of January, 1828, the Court pronounced the following Interlocutor, repelling the defence raised under the Statute of 6th Geo. I, and finding the Appellants liable to the payment, not only of the sum insured, but also of interest thereon from the time of the loss.

“ Having resumed consideration of these con-
 “ joined actions of reduction, and advised the
 “ same with the verdict of the jury award of Mr.
 “ Thomas Robertson, referred to and produced;
 “ and having also advised the mutual cases for
 “ the parties on the defence in law, founded on
 “ the Act 6th Geo. I, cap. 18, which was re-
 “ served by the Judge Admiral; and having now
 “ heard counsel thereon:—in respect the in-
 “ surance in question is an insurance against the
 “ risk of fire on a Steam Vessel, which is not a
 “ marine insurance contemplated by the said
 “ Act: the Lords, in the action of reduction, and
 “ for payment at the instance of William Mills

“ and others, find that the statute founded on
 “ does not apply to this case, repel the defence
 “ founded on the said statute, as well as the
 “ other defences to the said action, and reduce,
 “ decern, and declare in terms of the reduc-
 “ tive conclusions of the libel, and in respect of
 “ the said verdict and award find the defenders,
 “ conjunctly and severally, liable to the Pursuers
 “ in damages, modify the same to the sum of
 “ 3000*l.* and decern for payment thereof with
 “ interest thereon in terms of the libel; and in
 “ the action of reduction at the instance of the
 “ Albion Fire and Life Insurance Company, sus-
 “ tain the defences, assoilzie the defenders and
 “ decern: find the Albion Fire and Life In-
 “ surance Company and the defender, Thomas
 “ Hamilton, conjunctly and severally, liable in
 “ the expences of the conjoined processes in-
 “ curred in this and in the Admiralty Courts,
 “ allow an account thereof to be put in, and
 “ remit the same when lodged to the Auditor of
 “ Court to tax and to report.”

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Against this Interlocutor also the Appeal was instituted.

The cause being then again transmitted to the Jury Court upon the question of costs, the judges of that court, on the 25th January, 1828, ordered the Appellants to pay to the Respondents the costs incurred in that court.

This order is also included in the Appeal.

The damages, with interest and costs, amounting together to 4,675*l.* 16*s.* 8*d.* were afterwards paid by the Appellants, in pursuance of an order of the Court of Session made for that purpose, security being found for the same being refunded

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in case the judgment of the Court below should be reversed.

The Appeal was against the Interlocutors of the Court of Session, bearing date the 11th day of July, 1827, the 22d day of December, 1827, and the 22d day of January, 1828, and the order of the Jury Court, bearing date the 25th day of January, 1828.

For the Appellants :—

The original Policy renewed by the Memorandum of Midsummer, 1821, expressly excludes risk of fire at sea, and this was the only contract made by the Appellants. It was not competent for the Respondents on the trial of the issue to adduce any parole or collateral evidence in order to control and vary the clear import of the written evidence. It was more especially incompetent for the Respondents to adduce on the trial of the issue, parole evidence of the matters set forth in the Bill of Exceptions, the same being (in great part) matters which had taken place *inter alios*, and in which the Appellants were not concerned. It is inconsistent and repugnant to the whole body of evidence adduced in the cause, to make all the Appellants, some of them being principals and some agents, joint contractors, and jointly liable to indemnify the Respondents.

The Contract of Insurance founded upon by the Respondents was a Contract made and signed in England, by a Society established there, and from the date of that Contract, until and at the time of the loss of the Robert Bruce, the Statute 6, Geo. I, c. 18, was in force, and by the opera-

tion of that Act, it was incompetent for the Appellants to make themselves legally responsible for any risk which might befall the Robert Bruce "while at Sea."

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For the Respondents—

The whole evidence tendered by the Respondents at the trial, and admitted by the Judge, was competent and proper evidence for proving the matters in issue, and fully warranted the verdict returned by the jury.

It is argued that the loss occurred under the renewal receipt of 24th June, 1821, which bears expressly to be a renewal for another year of the policy, numbered 56,978, subscribed by the Appellants, in September 1820, and containing a clause expressly "excluding all the time the vessel might be at sea." The terms of that policy thus form the only admissible evidence of what was truly the contract of parties; and, therefore, no extrinsic or other evidence should have been admitted, in support of an allegation that their contract was different.

But this objection proceeds upon a misconception of the nature of the action, and of the issue that was tried. This was not an action on a policy, but for a policy, or for damages in consequence of not obtaining one. The foundation of the Respondent's claim was, that after contracting and paying for a policy to cover a special risk, no such policy was delivered; and the first conclusion of their summons, is, that the Appellants should be ordained to deliver such a policy, on which action might be brought.

The evidence produced by the Respondents,

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proved, that the price or premium advanced by the Respondents, was the highest premium then taken in Glasgow, for insuring steam vessels against fire, whether at sea, or in ports and rivers; that several of the Respondents had recently, at the same or a less premium, obtained such insurances upon other vessels of this description; and that they had taken no measures for covering by any other insurance, the principal risk which they ran, viz. that of fire, while at sea. The premium paid for insurance of vessels against fire, while in port or harbour, was proved to be 2s. 6d. or 3s. per cent. whereas the premium paid to the present Appellants, was 10s. 6d. per cent.: that the vessel was originally insured as a vessel "then actually plying between the Clyde and "Liverpool," and when her employment was afterwards changed to plying between the Clyde and Ireland, notice of that, as a material change of circumstances, was given and received by the Appellants: that immediately after taking the Respondent's money for the first insurance, (of which all the others were confessedly mere renewals or continuations,) and in transmitting the consequent order for a policy, the public and accredited agent of the Appellants, distinctly intimated to them, that the Respondents expected to be insured against fire risk while at sea, and that he, himself, was of opinion, that the policies then ordered, should be worded accordingly; and that though the Appellants are said to have rejected this suggestion, in a private letter to their agent, no communication of that rejection, nor any intimation whatever, of the limitation proposed to be inserted in the policy, was ever, at any time,

made to the Respondents, till after the loss had occurred: that though it was the universal practice of insurance agents in Glasgow, to send round and deliver the policies which they had engaged to furnish, the policies stipulated for by the Respondents, were retained and withheld by the Appellants, or their agents, and never tendered or exhibited till after the loss had occurred; and, that although there were repeated conversations on the subject of their insurance, between the Respondents, or some of them, and the agent of the Appellants, subsequent to the correspondence above referred to, no intimation was ever given of the restrictions, which are said to have been in their contemplation, nor any hint of the limited protection they proposed to afford.

Even if the policy, with the limitation referred to, had been tendered or delivered to the Respondents, they would not have been bound by that limitation, if they could show by clear evidence, that it had been inserted, either through fraud on the part of the Appellants, or through gross mistake on their own;* and the evidence admitted at the trial would have been competent and receivable evidence to prove such fraud or mistake. The general doctrine relied on by the Respondents is given, under those limitations and exceptions, by all the authorities. As there is no question here of the sufficiency of the evidence produced for the Respondents, it is not necessary to say more of it, than, that being calculated to prove

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* Phil. Evid. i. pp. 550, 558, &c. Fell on Guarantees, p. 58, &c. and cases there cited. Marshall i. pp. 349, 351, and cases cited.

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fraud or gross mistake, it was, at all events, competent to be received in the trial of such an issue; and that there is no room for an exception against the act of the Court in sending it to the Jury. At the same time, it is conceived to be quite clear, that it was sufficient and conclusive as to both points. That the limitation in the policy, could only have been inserted from the grossest mistake of the meaning, object, and understanding of the Respondents, was made out, beyond all possibility of question; and that it was inserted fraudulently and *mala fide* by the Appellants and their agent, is equally demonstrated by the facts, of their knowledge of the premium being equal to that required for an unlimited policy, their consciousness, as evidenced by the letter of their agent, that the Respondents relied on it as unlimited; and by their retention of that premium, and their concealment, and non-delivery of the instrument itself, till after the loss had occurred.

The statute of the 6th Geo. I, c. 18. had no bearing upon the question of fact set forth in the issue which was sent to trial; and could not competently be brought under the view of the Court or Jury, in the course of that trial, although it might have been (as it afterwards was) founded on as a bar to the Respondents recovering any judgment in the cause, or applying the verdict as the ground of such judgment. The appellants indeed, did not insist on this ground of exception in the Court below; and acknowledged by their subsequent proceedings, that they were aware it could not be sustained in that form of pleading.

The verdict of the Jury was properly returned for the Respondents generally, and without dis-

tinguishing between the case of the Appellant Hamilton, the agent in Glasgow, and that of the other Appellants, the office-bearers and partners of the Albion Insurance Company of London; and the Judge did, justly and legally refuse to direct the said Jury, to find alternatively, against one or other only of these Appellants.

It is objected that if the agent acted within his powers, then he bound only his constituents, and not himself individually, and the verdict ought to have been against the former only. If on the other hand, he acted beyond his powers, then he did not bind his constituents, and the verdict should have been against him only as an individual. But the resident agent or mandatory of a foreign party is, by the law of Scotland, liable, along with his principal, to any judgment or decree obtained in the Courts of that country, in the issue of suits maintained for behalf of such party, by such agent or mandatory, although confining himself strictly to the terms of his mandate or instructions. And an accredited agent in the general business of a party, whether in the same or in a foreign country, will bind that party to individuals who, *bond fide* contract with him in the name of such party, as to all matters falling apparently within the line or course of that general business, although it may happen, that by his private instructions, he was debarred from entering into such transactions.

No evidence being produced by the Appellants, to show whether the actings of the agent, in his dealings with the Respondents, were or were not within his powers or instructions, the justice of the case required that the verdict

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should be against both, conjunctly—their ultimate claims of relief, as against each other, being left entire, on the application of such verdict.

The act of 6 Geo. I, c. 18. plainly did not extend to Scotland, and was intended only to give the two favoured companies a monopoly of Marine Insurances in the English market; while the property insured, in the present instance, was Scottish property, and the contract for insurance entered into in Scotland, in a public office or place of business in Glasgow, and by parties who were not bound to know, and could not be affected by the provisions of any foreign law. It is said not to be clear that the statute did not extend to Scotland; and if it applied only to England, the contract here was between the Respondents and an English Company, known and held out to the Respondents as such; and, though locally concluded at Glasgow, by means of an agent, was no more a Scottish contract than if it had been arranged altogether in London, either by some of the Respondents repairing to that place in person, or by their corresponding with the Appellants in that city by post. But the act is manifestly applicable to England alone; as the necessary actions for giving effect to it are directed to be brought in the Courts at Westminster only; whereas, in another branch of the same statute which was meant to extend to Great Britain and Ireland, the relative actions are allowed to be brought in the Courts, either of Westminster, Edinburgh, or Dublin; and when it was afterwards thought expedient, that its provisions should be made operative in the American colonies, it was found necessary to pass an addi-

tional or supplementary statute (the 14 Geo. II. c. 37.) expressly extending them to these colonies.

Monopolies are unfavourable in law ; and are therefore to be strictly construed, especially when the sanction under which they are protected is that of nullity in *bona fide* contracts, entered into by persons not bound to be cognisant of their existence. The Appellants came into Scotland, and there set up an establishment, exactly similar to those which Scotchmen might lawfully set up ; and for the express purpose of dividing with such native establishments, the employment of Scottish customers. *Quoad hoc* therefore, their's was truly a Scottish establishment ; and there is no reason to think that even the Appellants transgressed any law which was binding on them, when they undertook this business in Scotland, (the monopoly of the companies favoured by the statute being manifestly the monopoly of the English Market only)—and it being free to them as British subjects, to carry on any branch of trade in Scotland, with the same privileges as natives. Nor could their connection with a head office in England take away those privileges, as to a true Scottish transaction. But, at all events, it will not make this an English contract, that one of the parties to it was settled in England. That party may, perhaps, be liable in penalties ; but the foreign party who actually contracted in his own country, and was neither bound nor presumed to know the English statute, ought not to be exposed to loss, by the annulment of his contract. The law of England may justly punish its proper subjects who violate its injunc-

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tions; but ought not to forfeit the rights of those who are not subject to it, and do not contract within its territory, or subject them to losses of which they had no warning.

The monopoly of the favoured Companies did not extend to the insurance of steam-vessels, which had no existence at the date of the statute, and are exposed to hazards of a particular description, and substantially different from any that could then be contemplated as the objects of marine insurance. Monopolies and restraints on the employment of capital and industry, are always to be construed as narrowly as possible, and never to be extended, by mere implication and analogy, to cases which they did not originally comprehend. The statute of apprenticeships, accordingly, has not been held applicable to trades that were not in existence at the time it was passed; and the same rule has been applied to many other cases far less clear and favourable than the present.

Even if the Appellants were themselves disabled by the statute from granting the Respondents a policy extending to the whole voyage, they were bound by their onerous contract, to have procured such a policy from one or other of the Companies favoured by that act, and are bound to repair to the Respondents the loss arising from their failure or omission so to procure it. By taking the Respondents' money (a sum of money proved to have been fully equal to the value of an unlimited policy,) they obviously became bound to procure and deliver such a policy. The Respondents, who did not know, and were not bound to know any disabili-

ties which might attach to them by the law of England, might, indeed, understand that the Appellants were themselves to fulfil this engagement, by executing and delivering such a policy in their own names. But they who pretend that they knew the law of England, and were bound to know it, cannot be permitted to say that they had any such understanding. They are barred from so construing the contract, by every principle of consistency and common honesty; and, considering that it is now finally established by the verdict of the Jury, that they did covenant and agree to deliver to the Respondents, a policy covering them from risk of fire while the vessel should be at sea, as well as while in port or in rivers; and as it is plain that such a policy might, at all events, have been procured from one or other of the privileged Companies, it seems undeniably to follow that it was their duty so to procure it; and that they have been justly subjected in reparation of the damages arising from their omission. They might have met the first and leading conclusion of the Respondents' summons, by delivering such a policy; but as they have not chosen to do so, they cannot be relieved from the other alternative, of paying the damage that has ensued.

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The Lord Chancellor.—There is a case which stands for judgment, of the Albion Company against Mills. It was a case of this description, upon which at present; for a particular reason, I will say only a few words, as I wish to have an opportunity of further considering the course which ought to be adopted :—the Plaintiffs, the

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Pursuers in the action below, were the Proprietors of a steam vessel called the Robert Bruce. There is an Insurance Company in London for Fire and Life Insurance, called the Albion Insurance Company; they have an establishment at Glasgow, a regular establishment and office there, conducted by a person of the name of Hamilton. A considerable quantity of insurance business on account of the London Insurance Company was transacted at that office. The owners of the Robert Bruce applied at the office at Glasgow to have their vessel insured—a steam vessel called the Robert Bruce. An agreement was entered into for the purpose by Mr. Hamilton the agent, and a policy was afterwards effected. Various questions have arisen, which were agitated in the Court below, and which have been much considered and discussed. One objection on the part of the Albion Insurance Company to pay this loss, was an objection arising out of the statute of 6 Geo. I. c. 18: it was said, that any policy of insurance, or any agreement for insurance entered into, under the circumstances under which this particular insurance was effected, was by means of that act of Parliament altogether void, and much argument was made use of both in the Court below, and at the bar here, for the purpose of determining this material and important question, whether that act extends to Scotland, to contracts entered into, and executed in that part of the United Kingdom. The Court below were of opinion that the statute did not apply to Scotland, and I am very much disposed to concur in that opinion.

But another most material and important question arose, one much more complicated, which was of this description, namely, whether the contract was a contract entered into in Scotland or in England, in other words, if the statute does not extend to Scotland, whether it was a contract so entered into in Scotland as to render it valid and binding. The Court below appear to have differed on that point, and they came to no conclusion with respect to it; but they decided the question on another point, quite wide of the decision of that question: they said this was a case of loss that did not come within the act, and I wish for the purpose of directing the attention of your Lordships and the parties to this point of the case, to read the very terms of their judgment—the final judgment: “Having resumed
 “consideration of these conjoined actions of
 “reduction, and advised the same with the
 “verdict of the jury award of Mr. Thomas
 “Robertson, referred to and produced, and
 “having also advised the mutual cases for the
 “parties, on the defence in law founded on the
 “act 6 Geo. I. c. 18. which was reserved by the
 “Judge Admiral, and having now heard counsel
 “thereon, in respect the insurance in question is
 “an insurance against the risk of fire on a steam
 “vessel, which is not a marine insurance, con-
 “templated by the said act, the Lords in the
 “action of reduction and for payment, at the
 “instance of William Mills and others, find that
 “the statute founded on does not apply to this
 “case, repel the defence founded on the said
 “statute, as well as the other defences to the
 “said action.”

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Now I confess I am not disposed at all to concur in that judgment. I think it is impossible that that judgment, according to my apprehension and understanding, can be sustained. In the first place, if you look to the words of the act of Parliament, they are most general and comprehensive; the words are—"that if any of the persons described, shall presume to grant, sign, or underwrite, after the 24th of June, 1720, any such policy or policies, or make any such contract or contracts for assurance of or upon any ship or ships, goods or merchandizes at sea or going to sea, or take or agree to take any premium or other reward for such policy or policies, every such policy and policies of assurance of or upon any such ship or ships, goods or merchandizes, shall be *ipso facto* void." It is in my opinion impossible to say, that an insurance on a steam vessel against fire was not distinctly and precisely within the language of this act of Parliament; and there is another circumstance to which I wish particularly to advert, which is this,—that fire is one of the risks expressly mentioned in all policies of insurance, according to the form that now exists, and as far as relates to that part of the case, existed at the time when this act of Parliament was passed. It not only comes expressly within the words of the act of Parliament, but within the terms of policies in use at the time. It appears to me therefore impossible, merely because some alteration has taken place with respect to the mode of propelling vessels of this description at sea, to say that cases of that kind do not come within the meaning and language of this act of Parliament.

It appears to me, with all respect and deference, (and I entertain the greatest respect and deference for the learned Judges by whom this is decided,) to be a proposition which cannot be supported. But at the same time that I state that decision to be in my opinion erroneous, I do not undertake at this moment to say whether on other grounds the judgment may not be sustained; and if your Lordships should be of opinion that on other grounds the judgment may be sustained, whether the House ought to decide at once upon the case as it at present stands, or whether it should be remitted to the Court in Scotland, for the purpose of calling upon the Tribunal there to come to a decision upon the point, which they seem to have avoided deciding, and to have cut the matter short by deciding the case, upon the ground open to the objection, as it appears to me, to which I have referred, that is a question on which I have not yet made up my mind. I have had some consultation with a noble and learned Lord, at present in the neighbourhood of this House: he thinks it is a question which deserves consideration, and I will endeavour to-morrow to give my opinion upon it, if I am in a condition, with propriety, to propose to your Lordships a judgment on the materials at present before you, without remitting the case to the Court below, in order that the Court below may come to a determination and decision on the question,—whether this is to be considered as an English or a Scotch contract. If I am, on the materials before me, authorized to propose to your Lordships a judgment, and it will be proper for this House to give a judgment on those materials, without calling on the Court

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below to pronounce their judgment upon the question I am ready to state my opinion: what that opinion will be, I will not at present anticipate, but I am prepared to give that opinion on the point of form. I feel desirous that this case should stand over, for the purpose of giving me an opportunity of considering that question, till to-morrow.

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After looking at the papers, and attending to them throughout, I should recommend to your Lordships to decide, that on the ground upon which the Court below pronounced their judgment, it cannot in point of law be sustained; but upon the whole, looking at all the papers, and the proceedings which have taken place in the Court below, and the transaction itself, there is, I conceive, sufficient to justify your Lordships in affirming the judgment, though on a different ground.

The circumstances of the case are these:— There is a Company in London called the Albion Fire and Life Insurance Company; that Company is so constituted, that, according to the law as it existed by virtue of the act of 6 Geo. I. c. 18. it is incompetent to effect insurances upon ships and merchandizes at sea; that is a point which is admitted in the case, and with respect to that it is not necessary I should make any further observation. This Company has an establishment at Glasgow, and a regular office at Glasgow, called the Albion Fire and Life Insurance Office, and they have a person attending there as their agent, a person of the name of Thomas Hamilton. They had been in the habit of entering into contracts and engagements to a considerable extent in Glasgow. When I say they had been in the

habit of entering into contracts and engagements to a considerable extent, I mean contracts and engagements similar to those which are the subject of the present inquiry. There were certain persons, who are the Respondents in this appeal, residing in Scotland, who were the owners of a steam vessel called the Robert Bruce. The owners of this vessel were desirous of insuring her, and they applied for that purpose to Mr. Hamilton, at the office at Glasgow, and upon their application at the office in Glasgow, the contract to which I will call your Lordships' attention, was entered into in these terms—

“ Albion Fire and Life Office,—Glasgow, 4th of
 “ July, 1820.—James Dennistoun, William Mills,
 “ Colin Arrot, James Moffat, John T. Alston,
 “ Esquires, as a committee of management, for
 “ themselves and others; having this day effected
 “ an insurance of 6000*l.* with the undersigned,
 “ on behalf of the Albion Fire and Life Insurance
 “ Company, London, on the property specified
 “ in the check corresponding with this memo-
 “ randum, a policy will be forthwith prepared at
 “ the office in London for the said insurance, and
 “ such policy will be delivered to the assured, or
 “ to his, her, or their order, on the third Monday
 “ in the ensuing month, or on any subsequent
 “ day. (Signed) P. THOMAS HAMILTON, Agent
 “ for the Company, ROBERT MITCHELL. Pre-
 “ mium 3*l.* 10*s.*—Duty 9*l.*”

This contract was drawn up at Glasgow, dated at Glasgow, and signed at Glasgow, by Hamilton, who was the agent for the Company. According to the ordinary course of business, Hamilton communicated this transaction to his princi-

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pals in London, and a policy of insurance was sent down to the office at Glasgow. It was not sent within the period limited by the contract, for it was not sent till the month of September, the contract having been entered into in the month of July. Any person looking at that contract must see, that it is in its form a general contract of insurance; that is, a contract for a policy, which shall be a general policy of insurance. There is no limit whatever, as to the places to which the contract is to extend; there is no exception in the contract; there is nothing expressing that when the policy comes down, it shall contain a clause, that the insurance is to be suspended while the vessel is at sea. It is a general contract of insurance; or rather they undertake that a general policy of insurance shall be executed. The policy of insurance that was sent down to the agent at Glasgow, (an insurance on the steam vessel against fire,) contained this clause, "this policy of insurance to be suspended and remain out of force, during the time the steam boat may be at sea." This policy of insurance, however, remained in the office of Hamilton. There is no evidence that it was ever shewn to the parties insured, nor any evidence to shew that the fact of this clause of exception, was ever communicated to them. Thus the transaction went on for a year.

At the expiration of the year, or shortly before that time, the Respondents applied to Hamilton, the second time, to extend the insurance another year; they paid Hamilton the premium of insurance for another year. There is no evidence to shew that the policy was then communicated to

them ; there is no evidence whatever of that fact. On the contrary, there is evidence of a different description. There is no evidence to shew that the exception in the policy, was at that time, or at any previous time, communicated to the assured. The money was received by Hamilton, and a memorandum given that the policy had been renewed.

A short time after the renewal of the policy, the vessel was destroyed by fire, on her passage from Liverpool to Dublin, and the persons who thus considered themselves assured by this contract, applied to Hamilton, for the payment of the loss. The answer they received was this. You are not entitled to recover ; for if you advert to the policy, you will find there is an exception in the policy ; the policy is not to have operation during the time the vessel is at sea. The assured upon this commenced proceedings, for the purpose of recovering the amount of the loss. Their proceedings were in the first instance instituted before the Judge Admiral, and the judgment was against the insured. It is unnecessary for me to enter into the terms of that judgment, for afterwards the proceedings came before the Court of Session.

On this question coming before the Court of Session, it was considered that there were two points :—One point was the question of fact, as to what the nature of the insurance was :—the other was the question of law, to which I yesterday alluded, and to which I shall again call your Lordships' attention. It was conceived that the question should be remitted to the Jury Court : it was so remitted, and the issue I am about to

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read, was that which was drawn up for the purpose of the trial. It is in these terms, "whether the Defenders promised and agreed to insure the Pursuers to the extent of 3000*l.*, or about that sum, from all loss and damage which might be caused by fire to the said steam vessel while at sea, as aforesaid ; and whether the Defenders have failed to perform the said promise and agreement, to the loss and damage of the Pursuers." The question turned entirely upon this part of the issue, namely, whether the agreement to insure extended to the period while the vessel was at sea. The cause came on for trial; the evidence was heard, and a verdict was found for the Pursuers. Exceptions were taken to the evidence, in the process of the trial. These were afterwards embodied into a bill of exceptions, which was signed by the learned Judge, who presided in the Court ; and has been printed in the papers, which have come before your Lordships for your consideration.

It appears to me, on looking at the exceptions, that there is only one material point to which it is necessary to call your Lordships' attention. It was said, and justly said, that where there is a written agreement to insure, a preparatory agreement, and afterwards a policy of insurance is effected in pursuance of that agreement, it is the policy which is the contract between the parties. The ordinary course of proceeding in the City of London is, that a slip is in the first instance signed, and after that slip is signed a policy is effected, and it is the policy which is the contract, and the slip cannot be adverted to for the purpose of explaining the meaning of the

parties. It was argued that no contract had been entered into at Glasgow, that it was an agreement for a policy, that the policy had been afterwards executed, and that must be considered, having been sent down to Scotland, to be the agreement between the parties. But there was this fallacy in that argument, the Pursuers brought their action upon the agreement as entered into by Hamilton, as signed by Hamilton. What was that agreement? That was an agreement for a general insurance. It was an agreement that a policy should be executed. That policy to be executed was to conform to the agreement. The policy had, it is true, been sent down, and if the parties had agreed to it, that would have bound them. But that policy did not conform to the original agreement:—it was never communicated to the parties that there was an alteration, and if the agent agreed to a general insurance that being within his duty as agent, it was imperatively his duty under those circumstances to communicate to the assured, that the policy having come down, the parties in London did not conceive themselves authorized in executing a general policy, but only a policy with the exception to which I have referred. No such communication was made by Hamilton, and therefore the owners of the vessel never adopted that, for they never knew it.—What then did they feel themselves justified in saying? It was this—We have entered into an agreement with your agent at Glasgow, for a policy of a particular description: you have never fulfilled that agreement:—you have received our money by which you bound yourselves to send down a

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general policy; instead of that you have sent down another policy, and we call upon you to fulfil that agreement.—That was the nature of the action.

But this agreement was only for the year, and at the expiration of the year, as I have stated to your Lordships, an application was made to the Company to renew the policy; and if the policy had been shewn at the time of the renewal, the policy would have been the contract. But when it was renewed nothing was said by Hamilton about the terms of it, nor was it shewn to the assured. When, therefore, the money was paid for the renewal, according to every principle of equity—(and this Court had jurisdiction both legally and equitably) according to every principle of law and equity and justice this renewal had reference to the original agreement, and they ought, therefore, to have executed it conformably to the stipulations of the original agreement. When, therefore, it was contended, as it was strenuously in the Jury Court, that the Court had no authority to look into any thing but the policy, that was rightly over-ruled: and when it was repeated at your Lordships' bar, it was impossible not at once to feel the fallacy of it, for it was clear that a policy was sent of a different description from that stipulated, and that it was not communicated to the parties that the agreement had not been fulfilled. The Jury, therefore, were in my opinion, justified in the verdict they found, and when we dispose of this general question on the bill of exceptions, it appears to me unnecessary to refer your Lordships to the other grounds of objection, stated in the bill of excep-

tions, because I think your Lordships will be of opinion, that if the way in which I am putting the question is the correct mode of deciding it, they are of little consequence in the decision of this case.

The question of fact being disposed of, the next in consideration was the question of law—it was said that they could not recover on this policy. Why? Because by the 6 Geo. I. c. 18, the monopoly of insurance by Companies on ships and merchandize at sea, is given to two particular Companies; namely, to the London Insurance Company, and to the Royal Exchange Assurance Company, and that, therefore, that contract was altogether void, whether it was an agreement for a policy, or a policy executed:—that the act of Parliament was a bar, the act of Parliament declaring that all policies executed by six persons other than those companies, shall be absolutely null and void.

The first question which arose in the discussion was this, and a very important general question it was:—Does that act extend to Scotland? that is, does that part of the act to which I have referred extend to Scotland? The act was passed with two views; it is the act generally called the Bubble Act; it was an act for the purpose of preventing those wild speculations which had currency at the period to which I have referred, and that part of the act specifically extends to Scotland; for it is stated in the body of the act, that the penalties which shall be imposed for the violation of that part of the act, shall be recovered in the Courts of Edinburgh, Dublin, or London. It is clear, therefore, that that part of the act was intended

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to extend to Scotland. But with respect to the other part, it is quite different. In the first place it is a little too strong to suppose that only these two English Companies could be intended to have a right to insure, not confined to England only, but extending to other parts of the kingdom; there is, in respect to that question, this important distinction, that the penalties are recoverable only in the Courts of Westminster, and it is impossible not to see that that part of the act of Parliament was intended to apply only to England. That point being decided, I conceive your Lordships will think yourselves justified in concurring in the judgment of the Court below.

Another question, very important in its nature, a question of law, was raised. There is an English Company it is said effecting an insurance, an English contract, and although this act of Parliament may not extend to Scotland, this is an insurance by an English Company, and therefore it is argued that it would be mere evasion to say that the parties in this case could recover on this in Scotland. This turns entirely on the question whether or not this was an English contract, or a Scotch contract. The way in which it was argued at the bar, and in the Court below, appears to me very fallacious. It was analogous to the argument, to which I have already referred, which was raised in the Jury Court, that the Policy is to be considered as the contract, and that the Policy was executed here by the Company, and if the Policy were the ground of action, the proceeding on a Policy so executed in London, might admit of doubt and question. But that is

not the case here. What is the nature of the action? Here is a contract entered into, not in London, but in Glasgow : written in Glasgow, dated in Glasgow, and subscribed in Glasgow, the consideration paid in Glasgow, at the office established, and for a long time established in Glasgow. Why is it then to be said, that that contract, I mean the original contract, was not a contract in Glasgow? If I send an agent to reside in Scotland, and he in my name enters into a contract in Scotland, the contract is to be considered as mine, where it is actually made. It is not an English contract, because I actually reside in England; if my agent executes it in Scotland, it is the same as if I were myself on the spot, and executed it in Scotland. The original contract, therefore, must be considered as a contract entered into in Scotland, and it was that original contract, and not the Policy, which was the ground of action; the action was brought for the infringement of that contract. You agreed to give me a general Policy, you did not give me a general Policy, I call upon you therefore for damages. It is said that the Insurance Company could not comply with that agreement, for that they could not have a general Policy. But if that is so, what had the assured to do with that? The agent stipulated to do it, if the directors in London could not do it. It is my opinion, that the agent in Glasgow might have made a valid Policy; but that if he could not have made a valid Policy, they are bound to make compensation for the breach of that contract so entered into in Glasgow. They were bound, in my humble judgment, by that contract by which they engaged

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to effect a Policy of a particular description, which they have not done; and not having done that, they are bound to make compensation to the party, in respect of all the loss he had sustained by their not having done so; the party being entitled to consider the case precisely as if the agreement had been executed.

Then with respect to the renewal of the Policy. What sort of a renewal was that to be? Here is an agreement to execute a valid Policy; the party insuring was entitled to consider that as a Policy, an undertaking to do that which was to be done. The rule operates upon that which the party agreed to do, and which a Court of Equity considers as already done, and therefore it is a renewal of a Policy having effect in Scotland. I am happy to say, that although the Court of Session were not unanimous upon this point, three of the judges were of opinion that this was to be considered as a contract in Scotland, and the Pursuers declared upon it as a contract so framed, a contract to be executed in Scotland. The other learned judge seemed to entertain a contrary opinion, and it was in consequence of the judges of the Court below differing in opinion upon this point, that they were led to do that which I think they were not justified in doing, namely, to decide the question on another point, which I consider as utterly untenable, the judges below having declared, that according to their opinion, this act of Parliament which prohibits all Companies from making insurances on ships and merchandizes at sea, does not apply to the case of a steam vessel. I stated to your Lordships yesterday my reasons for differing in opinion

from those learned judges, with respect to that point; and I do that with the utmost deference and the utmost respect. From all I have seen as to the judgments of those learned judges, I am led to entertain the highest respect for their knowledge and their attainments, but I am bound here in advising your Lordships in reference to the judgment here to be pronounced, after paying every attention to the subject, to act according to the result of my own opinion. I think that the grounds on which the learned judges decided this case in the Court below, cannot be sustained, but that upon the proceedings and the evidence, it is clear that the Pursuers are entitled to recover; they are entitled to recover upon the principle of this being an agreement for an insurance entered into in Scotland—a contract made in Scotland. The act of the 6th Geo. I. c. 18, not extending to Scotland, the contract is a valid contract, and the plaintiffs are entitled to recover damages, for the purpose of affording them compensation for the loss they have sustained by the breach of that agreement.

On these grounds, I should suggest that the judgment be affirmed, not in the terms in which it has been pronounced; but that, in your Lordships' opinion, the Pursuers have made good their claim. The form of the judgment shall be prepared, and I will on a future day submit it for the opinion of your Lordships.

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It is declared, that although this House is of opinion that the insurance upon which the Respondents sought to recover damages, is a species of insurance to which the statute 6th Geo. I. c. 18. does apply; yet inasmuch as this House is of opinion that the said statute, as to that part of it to which the interlocutor of the Court of Session of the 22d of January refers, does not extend to Scotland, the said appeal upon the facts of this case ought to be dismissed, and the interlocutors affirmed. It is therefore ordered and adjudged that the appeal be dismissed, and with the above declaration, that the several interlocutors complained of be affirmed.

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ACCOUNT. *Vide* MARRIAGE SETTLEMENT. TIME.

APPEAL:

1. C., by his will, devised his lands in trust for G. his brother, and heir for life; remainder to his brother's sons, in strict settlement, in tail male; remainder to S. the testator's sister, for life; remainder in like manner to her sons; remainder to K. for life, without impeachment of waste; remainder in strict settlement to his sons, in tail male; remainder to S. for life, with like remainder to his sons; remainder to the testator's right heirs. The lands were accordingly conveyed by the trustees, named in the will, to these uses.
- G. died without issue, leaving S. his heir at law, and she married P., and with her husband, levied a fine of the reversion, which had descended to her on the death of G., to such uses as S. should appoint; and she died, having appointed the reversion to P., during the joint lives of himself and A., until A. should attain twenty-one, or marriage; remainder as to one moiety to P. for life; and as to the other moiety, to A. for life; remainder as to the whole estate, to the sons, &c. of A., in tail; remainder (subject to a term) to P.
- K. entered upon the death of S., and died, devising his real estates charged with his debts, and bequeathing his personal estate to T. K., against whom a bill was filed; charging that K. during his possession of the lands, had committed equitable waste, by cutting trees planted, &c. for ornament, and praying that an account might be taken of the trees cut, and the value, and that T. K. as representative of K., might pay the amount out of his assets. A decree was made according to the prayer of the bill. But before the Master had proceeded under the decree, the question of value, and all matters in difference between the parties, were, by an order of the Court by consent, referred to an arbitrator, appointed by the Master under the order, and arbitration bonds were executed by the parties. The arbitrator by his award, found that a sum of 387*l.* which included the value of the timber cut, was the

balance due to the Plaintiff, and directed it to be paid. An application being made to enforce the payment of the money, according to the award, the Defendant presented a petition of re-hearing, which suspended the proceedings upon the award, and the case having been re-heard, the bill was dismissed, but no order was made respecting the award.

Upon appeal against this decree, held, that the House of Lords could not proceed until there should be a judgment upon the whole of the proceedings before the Court below, and a special order was made, by which the Appellants had leave to withdraw their appeal, for the purpose of obtaining the judgment of the inferior Court, upon the question as to the award.

Semb. That such a reference as above stated, submits the law as well as the fact to the arbitrator.—*Butler v. Kynnersley*, p. 374

2. The House of Lords having made an order, containing declarations as to the right of parties, and remitting the case to the Court below, with directions; it is not competent to the Court below, upon the same state of evidence, to give any judgment inconsistent with the declarations and directions of the House of Lords.—*McNeill v. Cahill* - - - p. 316

ASSETS. *See* TIME.

AWARD. *See* APPEAL.

Upon a bill by the assignee of a judgment against the conusor, stating an award, in which a certain sum was found due upon the judgment; and praying that accounts might be taken against the conusor upon the foot of the award, and the judgment, the Defendant, the conusor, cannot by his answer impeach the award, and raise questions which had been discussed before, and decided by the arbitrators, as to the state of accounts between the Defendant as counsel, and the conusor of the judgment.—*Hill v. Ball* - - p. 1

BARON & FEME. *Vide* MORTGAGE.

CHARITY :

1. A. by a deed executed in 1616, for a nominal consideration, conveyed to certain persons therein named, certain premises, which were then let upon lease for forty-one years, at a rent of 150*l.* By another deed of the same date, reciting among other purposes, a desire to relieve the poor of the Mystery of Mercers, of which the grantor was free; and the better to manifest his love and affection towards his brethren, the free-men of the said Company, it was declared, that the grant of the premises comprised in the former deed, and of the rent of 150*l.*, reserved upon the lease, was made upon trust as to the premises, and the rent reserved, and all future rents and profits; that the grantees should receive and pay the monies arising therefrom to the wardens of the Mystery of

Mercers of the City of London, and their successors; and that the said wardens and commonalty should dispose of the monies to the uses therein mentioned. The schedule annexed to the deed then enumerated various charitable objects to which the money was to be applied; among which, was a donation to poor brethren of the Mercers' Company. These donations amounted altogether to 149*l.* 11*s.*, leaving a sum of 9*s.* of the reserved rent of 150*l.* unapplied, in the hands of the Mercers' Company. By improvements of, and additions to the estate, in consequence of an act of inclosure, the rent increased to a sum of 1000*l.* a year, at which rent the premises were let in 1817. Of this increased rent, the Mercers' applied 521*l.* 2*s.* in various payments, according to the trust; the residue of the rents of the estate they had for many years carried to the general account of the Company, and applied them to their own use.

Upon an information filed to regulate the Charity, held in the Court below, and on appeal, that the Mercers' Company were trustees of the rents, and augmented rents, and that the surplus, after answering the payments directed by the deed, was applicable to such and the same purposes, as directed by the deed, without prejudice to the question, how far the Mercers' Company were entitled to share in the increased rents, with reference to their share of the original rent of 150*l.*—*Mercers' Company v. Attorney General* - - - p. 165

2. By a deed granting lands, &c. to a Corporation of the City of London, to be applied to charitable uses, it was provided, that if the premises should be evicted, the Company should be discharged from any further payment, or continuance of the uses; and if the premises, by alteration of times, should so much decay in rent, that the uses could not be supported therewith, the Company should only be chargeable with the payments appointed to Christ's Hospital, and to the Company of Barber Surgeons, being 6*l.* yearly; and from thenceforth it should be lawful for the said Company, to make such abatement of the sums before limited, except the 6*l.* to Christ's Hospital and the Barber Surgeons, as should be answerable to the fall of the rents which should so happen.

Held that this was conditional, and not a positive charge upon the grantees, to be paid by them, at all events, so as to furnish an inference, that, being subject to such charge, they must be entitled to a surplus of the rents, arising by an increase in the value of the property.—*Mercers' Company v. Attorney General* - - - - - p. 184

CONDITION. *Vide* MARRIAGE SETTLEMENT.

CONSTRUCTION. *Vide* MARRIAGE SETTLEMENT.

COSTS. *Vide* JURISDICTION.

COVENANT. *See* MARRAGE.

DEBTOR and CREDITOR :

D. having an estate for life, in lands, situate in England and Ireland, assigned them, together with his furniture, &c., by several indentures, to trustees, for a term of ninety-nine years, if he should so long live, in trust, out of the rents and profits after satisfaction of a jointure, prior to the life estate, and the interest of a mortgage, and certain annuities created by the Appellant, to pay to the Appellant an annuity of 5000*l.* and to his creditors by bond, judgment, and simple contract, (parties to the deed of assignment,) interest at the rate of 5*l.* per cent. upon their respective debts; and to apply the surplus, from time to time, in the gradual extinction of the capital of the debts.

The creditors generally executed the deed of trust and assignment, by which they covenanted not to sue the Appellant. But P. and B., creditors of D., by simple contract, having obtained judgment for their debts, first in England, and afterwards in Ireland, sued out a writ of *ſeri facias*, directed to the sheriff of the county of R. in Ireland, who seized the goods of D., but refused to sell them, in consequence of a claim made by the trustees, to whom they had been assigned by D.; whereupon P. and B. in 1820, filed a bill in chancery in Ireland, on behalf of themselves and other creditors of D., which stated these facts; and setting forth, in part, the deed of trust and assignment, as it appeared in the registry; but alleging that they were ignorant of the trusts, prayed that the Defendants might set forth the deed, and that the creditors might have power to elect to take the benefit of the deed; or otherwise, that it might be declared fraudulent and void as to them, and that in the meantime a receiver of the rents might be appointed, and that they might be applied in payment of the debts. After the bill was filed, two of the trustees died, and two new trustees were appointed. D. and the surviving trustee put in their answers.

In 1824, P. and B. filed a supplemental bill against D. and the surviving trustee, stating the deed of assignment and trust: that under it D. was entitled to a rent charge, issuing out of the lands held in trust by the surviving trustee, and that they had sued out an *elegit* against D., for the sum of 1027*l.*, directed to the sheriff of R., who returned, that D. or his trustee was seized of a freehold rent, issuing out of lands in the county of R.; one moiety of which he had delivered to P. and B. to hold, &c., till they had levied the damages marked on the writ. They claimed by the bill, to be entitled either to a moiety of the lands, or of the rent charge, or to have satisfaction of their judgment, out of the annuity payable to D.,

under the trusts of the deed. Upon these grounds they prayed by their bill, a receiver either of a moiety of the lands comprised in the sheriff's return to the writ, to the extent of one moiety of the 5000*l.* per annum, or of the lands comprised in the deeds of assignment and trust; and after satisfaction of the charges having priority according to the trusts of the deed, that a moiety of a competent part of the 5000*l.* per annum, might be applied in payment of their demand, and that the trustee might be restrained from paying the annuity to D., till the demand was satisfied.

After the filing of the bill, two orders were made; one for the appointment of a receiver, the other restraining the trustee from paying the annuity to D., to the amount of 1260*l.* The trustee, by his answer, suggested that his co-trustees, and the creditors of D., were necessary parties to the suit. D. by his answer, insisted upon the validity of the deed, and priority of the trusts, (including his own annuity,) over the judgment of P. and B. As soon as the answers were filed, applications were made to the Master of the Rolls, on the part of D., to discharge the receiver, and rescind the injunction; and on the part of P. and B., to continue the receiver and injunction, till the hearing, which was granted, and the motion of D. was refused; and this decision was affirmed on appeal to the Lord Chancellor of Ireland.

Held, affirming the judgments of the Courts below, that under the circumstances above stated, the orders appointing a receiver, and restraining the surviving trustee from paying the annuity to D., were properly made; that it was not necessary for this purpose, that the prior incumbrancers, nor the creditors, parties to the deed of trust, nor the substituted trustees, should be parties to the suit. Held, also, that the defects in the sheriff's return to the *elegit* were immaterial, as no return is necessary, and the suing out an *elegit* is sufficient to ground the equity. Held, further, that one *elegit* is sufficient, although the rent was payable out of lands in three counties.—*Dillon v. Plackett* - - - p. 239

DEMURRER. See PLEADING.

DEVISE. See MERGER.

A. by his will, limited his lands to E. his daughter and H. her husband, for their lives, &c.; remainder to their sons successively in tail; remainder to M. his daughter, and F. her husband, for their lives, &c.; remainder to their sons successively in tail; with divers remainders over, including C. and his sons, and their issue; and he declared and provided by the will, that in case M. or F., or the sons or son of F. and M., or either of them, should become entitled to the estate under the limitations of the will, a sum of 2,000*l.* should

be charged on the lands in possession, for the use of the younger children of C., in certain specific proportions. E. and H. died without issue. The sons of M. and F. died before the estate became vested in them; and after the death of M. and F., and the expiration of the preceding life estates, G., a grandson of M. and F., became entitled under the limitations of the will to an estate tail.

Held in the Court below, and on appeal, that the lands having vested in a grandson, and not in a son of M. and F., were nevertheless liable to the charge created by the will in favor of the younger children of C. *Gore v. Lord Lorton*, p. 286.

ELECTION. *See* MERGER.

EQUITY. *Vide* DEBTOR and CREDITOR. FRAUD. LESSOR and LESSEE. PLEADING.

ERROR. *Vide* PREROGATIVE.

The opinion of a judge directing the plaintiff in an action to be nonsuited, if it does not appear on the record, cannot be questioned in a writ of error. The plaintiff, if he intends to bring a writ of error on the ground of mis-direction, in point of law, should not submit to be nonsuited, but appear, and put the judge to express such opinion, by way of direction to the jury; and thereupon tender a bill of exceptions to the judge, and procure his signature thereto. D. d.—*Tolson v. Fisher* - - - - - p. 9

EVIDENCE. *Vide* MARRIAGE SETTLEMENT. DEED. PARTNERSHIP. TITHES.

In a suit in Equity, seeking to charge the lands of A. by virtue of marriage articles executed by A., the original articles were not produced, but it was in proof that H. was the executor of A.; that the house of H. in Ireland had been occupied by a French and rebel army, and his papers ransacked and scattered; that L. was the executor of H., and that the houses of H. and L. had been searched, but that the original articles could not be found. Under these circumstances, secondary evidence, viz. a copy of the articles sent with a case laid before counsel; a charge in the solicitor's bill for the copy and case; a recital of the articles in an Act of Parliament for settling lands on the issue of the marriage, and a deed appointing a jointure according to the articles and portions to children, under a power reserved by the act, were admitted as proof of the existence and contents of the articles.

This decision was affirmed on appeal. *Gore v. Lord Lorton* - - - - - p. 286

EXECUTION. *Vide* DEBTOR and CREDITOR.

EXEMPTION. *Vide* TITHES, 2.

FOREIGNER. *See* PLEADING.

FORFEITURE. *See* LESSOR and LESSEE.

FRAUD.

A., an army agent in Dublin, having effected a policy of insurance on his own life for 3000*l.* in 1819, by an informal instrument, attested by two witnesses, assigned the policy to C., who had been for many years his confidential clerk. From the time of the assignment A. paid two-thirds, and C. one-third of the premium. In 1821, by a more formal instrument, drawn up by a professional person, he executed a further assignment of the policy. In the first instrument, the consideration expressed is "*regard and affection*;" in the second, "*friendship and affection*." The last assignment was drawn up by the attorney of C., and both the instruments were drawn up and executed, without the knowledge of A.'s family.

By a codicil to his will, A. gave to C. a legacy of 100*l.* "as a further mark of his regard and affection." Upon the death of A., a letter addressed to his son, was found enclosed in his will, stating that the assignment had been extorted from him by C. by threats and undue influence.

Upon a bill filed by H., as executor of A., to set aside the assignment on the ground of fraud, and undue influence, C. by his answer, claimed the interest under the assignment as a compensation given to him by A., in the place of an increase of salary. Upon the depositions it appeared in evidence, that C. had given different accounts of the object of the policy, viz. that it was effected as a provision for the wife of A., and that it had been given to him, for making up the accounts of A., in a way to deceive Government.

It appeared also in proof of the charge of influence, that C. had declared when the codicil was in contemplation, that none should be executed unless he chose; and when the letter was found in the will, that he said he could ruin the credit of the house and the character of the testator. Upon this, and other evidence, an issue was directed at the instance of the defendant, to try whether the assignments as to two-thirds of the sum insured, were the free and voluntary acts of the testator, or extorted from him by threats or undue influence, or obtained by fraud; the defendant upon the trial of this issue, was to produce the deeds of assignment, and the attesting witnesses.

Upon the trial of the issue, the letter found enclosed in the will was tendered in evidence by the plaintiff, but rejected. The defendant produced no witnesses; whereupon the jury found that in the event of *any assignment* having been made, as to two-thirds thereof, it was obtained by undue influence.

A motion to set aside this verdict, and grant a new trial, was refused, and upon a rehearing, a decree was made in favor of the plaintiff.

This decree was affirmed on appeal.—*Collins v. Hare* 106
GUARDIAN.

The Court of Chancery has jurisdiction to appoint a guardian for infants, being wards of the Court, excluding the father; and upon evidence that the father was living in a state of adultery, and had encouraged his children in swearing, keeping low company, &c. it was held a fit case to exercise the power to exclude him from the guardianship. *Wellesley v. Wellesley* 124

HUSBAND AND WIFE. See MORTGAGE.

INSURANCE. See INDEX TO APPENDIX.

INTEREST. Vide MORTGAGE.

ISSUES. Vide PARTNERSHIP.

JUDGE. (DIRECTION OF) See ERROR. FRAUD.

JURISDICTION. Vide GUARDIANSHIP. PREROGATIVE.

The Stat. 27th Geo. III. c. 44. entitled an act to prevent frivolous and vexatious suits in Ecclesiastical Courts, and reciting in the preamble, that it is expedient to limit the time for the commencement of certain suits in the Ecclesiastical Courts, enacts (among other things) that no suit shall be commenced in any Ecclesiastical Court for fornication or incontinence, after the expiration of eight calendar months, from the time when such offence shall have been committed.

Upon a libel in the Ecclesiastical Court against a clergyman, containing various articles charging fornication, &c.; and in the concluding article willing that the offender be duly and canonically *punished* and *corrected* according to the exigency of the law, &c.; an objection taken to the jurisdiction, on the ground of the Statute 27th Geo. III. c. 44. was overruled in the Ecclesiastical Court; whereupon a writ of prohibition was obtained in the Court of King's Bench, and upon declaration in prohibition, demurrer, and argument, it was held that the statute applied only to proceedings against fornicators, &c. whether laymen or clergymen, *pro salute animæ*; but that a proceeding in the Ecclesiastical Court on the ground of fornication, against a clergyman, for the purpose of deprivation, is not prohibited by the statute, and this judgment was affirmed on appeal.

Held also that the judgment of the Court of King's Bench being for a prohibition, against proceeding on the ground of fornication, *pro salute animæ*, but granting a consultation so far as the case related to the proceeding for deprivation, the statute 8 and 9, W. 3. c. 11. which gives costs to the party who obtains the judgment in prohibition, did not apply, inasmuch

as it was a qualified judgment, which in substance was for the defendant in the prohibition, and that if it was to be considered as a *casus omissus*, there was no authority in the Court to give costs.—*Free v. Burgoyne* . . . 65

LACHES. *See* TIME.

LESSOR AND LESSEE.

A lease of lands in Ireland, contained a covenant on the part of the lessor for perpetual renewal; and a covenant on the part of the lessee, to pay 1*l.* sterling for every perch of bog, cut otherwise than thereby covenanted, and to be distrained for as additional rent. Upon a bill filed by the assignee of the lease, and his mortgagees against the assignee of the lessor, for a specific performance of the covenant for renewal, it appeared that three years before the filing of the bill, a notice had been given by the landlord to the tenant to name new lives in the place of those which had expired, and to pay the fines, with interest, &c.; but in the interval, a correspondence had taken place, from which it was to be collected, that the tenant had always been ready to pay the fine; but that the landlord alleging, by his answer in the suit supported by evidence, that the tenant had cut large quantities of turf in breach of his covenant, and had also made encroachments upon other lands, refused to renew until those two questions were settled; and although no actual tender of the fines had been made, it was clear from the correspondence that they would have been refused, if made.

Held, affirming the decree of the Court below, that under these circumstances, the delay of three years was not under the Irish Tenantry Act, such gross *laches* as ought to deprive the tenant of the right of renewal, and work a forfeiture of the lease; but that the landlord ought to be compelled specifically to perform the covenant for renewal. Held, also, that in making this decree, for the performance of part of the contract between the parties, it is not necessary for a Court of Equity to provide for the performance of the other part: namely, the covenant against cutting turf, otherwise than by leaving the landlord at liberty, by the decree upon further directions, to bring an action at law upon that covenant, especially as that liberty had been given by the original decree; and an action brought against the tenant which abated by his death, and thereupon no application had been made by the landlord to the Court of Equity for its assistance.—*Trent v. Dwyer* . . . 11

MANOR. *See* PREROGATIVE.

MARRIAGE. *See* APPENDIX TO SCOTCH CASES.

MARRIAGE SETTLEMENT.

A motion to set aside this verdict, and grant a new trial, was refused, and upon a rehearing, a decree was made in favor of the plaintiff.

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MANOR. See **PREROGATIVE**.

MARRIAGE. See **APPENDIX TO SCOTCH CASES**.

MARRIAGE SETTLEMENT.

A., by marriage articles, bound himself "to pay to H. upon his marriage with E., (the said H. settling all the estates and money he was entitled to on the issue of the marriage, and a suitable jointure to the fortune E. gave him,) the sum of 5,000*l*." H. in the same articles bound himself "to settle all the estate and money which he was then entitled to upon the issue of E., and a jointure of 500*l*. a year."

Four years after the date of these articles and the marriage, H. acquired an estate which was limited to the issue of the marriage, with a power reserved to H. under which after a lapse of twenty-six years, he by deed appointed to his wife E. 500*l*. per annum. by way of jointure, and 6,000*l*. to the younger children of the marriage as portions.

Held in the Court below, and on appeal, that this was a performance of the condition upon which A. contracted to give to H. a marriage portion of 5,000*l*.; and that so much of that sum as was not paid on the marriage, became due on that event, and was a charge on the estate of A. payable with interest from the date of the marriage.—*Gore v. Lord Lorton* - - - - - p. 286

MERGER:

P. being possessed of lands, for a term of lives, with a covenant for a perpetual renewal, by articles made upon the marriage of his son, in the year 1743, covenanted to convey his estate, and interest in the lands, to W., and other trustees, to the use of himself for life; remainder to the use of his son T. for life; remainder, subject to a jointure, to the sons of the marriage successively, in tail male; reversion to P. the settler.

In 1749, the reversion of the lands, subject to the lease, was granted to W., as trustee for P., to whom it was soon afterwards granted over by W.

P., by his will, dated in 1766, devised all his real estate, including his leases for lives, in trust for T. his son, for life; remainder to P. (son of T.,) his grandson, for life; remainder to the sons of P. the grandson, successively, in tail male, with divers remainders over; reversion to the heirs of P. the deviser. The testator by his will, declared, that "if his grandson P. should not settle such interest in that part of the lands, which was settled on his father's intermarriage, and which he would become entitled to on the testator's and his father's decease, to the uses to which the testator's estates were thereby limited, upon the desire of his father, his son T., at his will and pleasure, and in his discretion, might, and was by the will, empowered to deprive P., the grandson, of the life estate in the lands thereby limited to him, so as such deprivation should not alter the limitations in remainder;" and in a subsequent clause, having provided,

" that in case his grandson P. happened to die without issue male, and should settle the interest which was settled on his father's marriage, in part of the real estates of the testator, and to the same uses as limited by the will, so that his acquisitions should go together," he gave to P. a power to charge the lands devised with portions for daughters; and in a subsequent part of the will, he gave a power to P. to charge a jointure upon the real estate of inheritance, thereby limited to him, providing he settles his said interest in part of the real estate, to the uses therein mentioned.

P. the testator died in 1769. T. his son entered upon the lands, under the limitations of the will, and remained in possession during his life. In 1776, T., and P. the grandson, upon the occasion, and in consideration of his marriage and a portion, conveyed the term for lives, with the right of covenant for perpetual renewal, in trust, to secure a jointure to the wife, and subject thereto for the use of T. for life; remainder to P. for life; remainder to secure another jointure, and subject thereto to the sons of the marriage; and in default of issue male, to the trustees for a term, to raise portions for daughters, and subject thereto for T. in fee.

Upon a bill filed by a party claiming under this settlement against parties claiming the reversion, to compel a specific performance of the covenant for renewal, held, that according to the limitations, and upon the events above stated, the term of the lands was not merged in the fee; that no case of election arose upon the will of Peter Rutledge, binding those who took under that will, to leave the term in question to go according to the limitations of the will.—*Rutledge v. Rutledge*, p. 352

MORTGAGE. See TIME.

N. being entitled to certain lands, as issue in tail, conveyed them in 1749, by lease and re-lease, to a mortgagee in fee to secure 800*l.* borrowed, and levied a fine of the lands pursuant to covenant for the purpose of perfecting the security. In 1762, N. borrowed 450*l.*, and charged it upon the same lands by deed poll. In 1764, N. died, leaving the charge upon the lands of the aggregate sum of 1250*l.*, with an arrear of interest, and by his will devised all his lands to M. his wife. In 1766, M. having married A. B., he with M. his wife, by lease and re-lease reciting the mortgage, and that A. B. had paid the interest, granted and confirmed the lands to the mortgagee, reserving the equity of redemption to A. B., his heirs, &c. By a deed in 1789, 300*l.* an arrear of interest, was added to the principal, and the aggregate sum of 1550*l.* was charged on the lands, subject to redemption as by the former deed. In 1794 M. died, leaving R. H., a son by the

first husband, her heir at law. In 1797, A. B. sold part of the mortgaged lands, and in consideration of 2000*l.* principal and interest, paid to the mortgagee, and 600*l.* paid to A. B., he and the mortgagee conveyed such part of the lands to R. R. the purchaser. The lands remaining unsold, were conveyed by the mortgagee to A. B., who died in 1799. Under these circumstances, the heir at law of M. filed a bill in the Exchequer to redeem the lands, and the Court decreed that he was entitled to redeem on payment of the principal money due upon the mortgage, and interest calculated from the death of A. B.

Upon appeal to the House of Lords from this decree, it was declared that R. H. as heir at law of M., was entitled, notwithstanding the proviso for redemption reserved to A. B., by the deed made between him and the mortgagee, to redeem the lands "on payment of the principal money and interest, due at the death of M. on the aggregate sum of 1250*l.* Such interest to be computed according to the proviso in the indenture of re-lease and mortgage. A. B. being entitled in equity, to have the interest due at the death of his wife, added to the principal, and considered as an aggregate sum with the principal, A. B. and M. his wife not being bound to keep down the interest during her life, for the benefit of her heir at law, &c.; and that an account should be taken of what was due for principal and interest on the mortgage at the death of M." The decree of the Exchequer being varied according to this order, it was referred to the Master to take the accounts so directed, and it appeared in evidence before him, that A. B. and M. his wife, during her life, paid to the mortgagee, on account of interest, 1500*l.*; that the Master in his report did not include this sum, but reported that there was due upon this account for principal 1250*l.*, and for interest at the death of M. 286*l.* 9*s.* 2*d.* On this ground exceptions were taken to the report, which being in this respect confirmed, and a decree made upon further directions accordingly, a farther appeal was presented to the House of Lords.

But the decree was affirmed, the House being of opinion that the representative of the husband was not entitled, as against the heir of the wife, to an allowance of interest actually paid by the husband during the life of his wife, and that the former order of the House, directing the account of interest due on the mortgage at the death of M., meant interest actually due.—*Ruscombe v. Hare* p. 192

PARTIES. See PLEADING. TIME.

PARTNERSHIP:

A., by his will, declaring a purpose to assign the lease of a

hotel, in which he carried on business, with the effects in the hotel, and the business of it, to a trustee in trust, for the benefit of his son and daughter, in consideration of an annuity to be paid to him for his life, bequeathed the residue of his personal estate and effects to his son and daughter in equal shares. The testator died without having carried into effect the purpose declared in his will. His daughter being executrix, carried on the business from the death of the testator, to the year 1810, in the house where the testator had carried it on. In that year she purchased, chiefly by means of the assets, the freehold of another house, to which she removed the business, and carried it on there until 1819, when she married. Upon the marriage, the freehold house and effects were conveyed and assigned to a trustee for the daughter and her husband, and the children of the marriage in the ordinary course of settlement. In 1820, the son filed a bill against the daughter and her husband, praying that the deed of settlement might be set aside; that the freehold house might be declared to be part of the assets, and sold with the effects, &c.; that an account might be taken of the profits of the business, from the death of the testator to 1819, the date of the marriage; and that half the assets, and half the profits of the business, might be paid to him as residuary legatee and partner.

The case of the plaintiff as to the partnership, was supported by the evidence of the will, and of acts and admissions on the part of his sister, at various times before the marriage, of her liability to account as partner. The Defendants insisted upon an agreement between the Plaintiff and his sister, shortly after the death of the father, that the lease of the hotel, and the effects should be valued, and the produce divided between them; that they were accordingly valued, and that the half of the amount of the valuation had been paid to the Plaintiff by his sister; but this alleged agreement did not include any consideration for the goodwill of the business. The Defendants also produced in evidence, a letter written from Paris by the Plaintiff, in which he spoke of the business as not belonging to him; but this letter he sought to explain, by stating, that he could not with safety, being in France during war, acknowledge that he had any property or concerns in England.

Upon these pleadings and the evidence, issues were directed at the hearing to try: 1, whether there was any agreement for the sale of the lease, effects, and goodwill of the business; and if so, 2, whether such agreement had been abandoned. No issue was directed on the question of partnership. Upon the trial of these issues, verdicts were given for the Plaintiff

in equity on both issues. Upon further directions, the Court (Vice Chancellor) declared that a partnership in moieties, subsisted between the son and daughter, from the death of the father to the marriage of the daughter, when the partnership was dissolved, and that the freehold house was part of the assets, and an account was directed accordingly.

Against this decree the Defendants appealed to the Chancellor, and the decree being affirmed with a slight variation, the Defendants further appealed to Parliament, and insisted that an issue should be directed to try the question of fact, whether a partnership subsisted; but the decree was affirmed, the House being of opinion that it was too late in that stage of the cause to ask for such issue.—*Burnand v. Noret* - p. 215

PLEADING. See **PARTNERSHIP. PREROGATIVE. TIME. TITERS.**

By a treaty between the governments of France and Spain, it was agreed, that France should pay to the King of Spain a certain sum of money, to be distributed by him among his subjects having claims against the government of France. This sum by the terms of the treaty, was made payable to an agent to be appointed by the King of Spain. He accordingly appointed an agent, who received the sum stipulated, and afterwards deposited part of it in the hands of Merchants in London, in the name of his secretary. But accounts of the money so deposited were rendered by the merchants to the depositor, and not to his secretary.

Upon a bill filed in equity, in the name of the King of Spain as Plaintiff, against the depositories and the depositor, stating these facts, and praying a discovery, account, and payment of the money into Court, &c., the Defendants demurred upon the grounds that there was a defect of parties, and that a foreign sovereign cannot sue in a Court of Equity in England: held, affirming the order of the Court below, that the demurrer was properly overruled; that a foreign sovereign may sue as Plaintiff in equity; and that under the circumstances of the case, it was not necessary that the *cestui que trusts*, (the Spanish claimants) or the nominee of the agents, should be parties to the suit.

Whether after the money has been brought into Court, the parties having an interest in the final distribution, could sustain a bill to effectuate their claims—*Quære. Hullett v. the King of Spain* - - - - - p. 31

PRACTICE. See **APPEAL. DEBTOR and CREDITOR. PARTNERSHIP. TIME.**

PREROGATIVE.

Upon a commission under the great seal, and an inquisition re-

turned into and filed in the Petty Bag Office of the Court of Chancery, lands were seized into the king's hands as derelict by the sea. The lord of the adjoining manor, upon petition to the Lord Chancellor, having obtained leave to traverse the inquisition, filed his traverse in the Petty Bag, denying that the lands were *derelict*, and pleading that they were formed by alluvion, or gradual deposit of soil. The Attorney General, in his replication to this traverse, took issue upon the alleged fact of alluvion, and the Defendant joined issue. Upon the trial, a verdict was found for the Defendant, and afterwards, upon application of the Attorney General for a new trial, the Court ordered the facts proved to be stated in a special case, which being argued, a verdict for the Defendant was entered by direction of the Court.

A writ of error from this judgment, directly to the House of Lords, being brought by the Attorney General, on behalf of the Crown; held, that the House of Lords has jurisdiction to hear such writ of error; that it is not necessary to carry a writ of error first to the Exchequer Chamber, and that lands formed by alluvion, that is by gradual and imperceptible deposit on the shore of the sea, belong to the lord of the adjoining manor, and not to the king, *Jura coronæ*.

A custom regulating the rights of the owners of all lands bordering on the sea, is so general, that it need not be pleaded.

Res v. Yarborough - - - - - p. 147

PROHIBITION. *Vide JURISDICTION.*

SOVEREIGN FOREIGN. *Vide PLEADING.*

SPECIFIC PERFORMANCE. *See MERGER.*

STATUTE 27, Geo. III. c. 44. *See JURISDICTION.*

8 and 9, W. III. c. 11. *See JURISDICTION.*

TENANT FOR LIFE. *See MORTGAGE.*

TERM. *See MERGER.*

TIME:

An account was pending between A. and H. to the period of the death of A. In the years 1758 and 1764, H. had paid the sums of 200*l.* and 400*l.* of the debts of A., and had from time to time, and at the periods of these payments, received various monies belonging to A., from his agents. A bill being filed by the representatives of A., to ascertain and raise certain charges upon A.'s estate; H. in his answer, made no claim in respect of the payments of 200*l.*, or the 400*l.*, and in two successive charges sent in by him before the Master, he did not make any such claim; but at last, in the year 1817, he produced a charge, in which those sums were claimed with interest.

Held in the Court below, and on appeal, that under these circumstances the claims were barred by *laches* and length of

time, notwithstanding the pendency of the accounts; and were properly disallowed in the same account in which H. was charged with monies from time to time, and during the period in question, advanced to him by the agents of A.—

Gore v. Lord Lorton - - - - - p. 286

A bill for an account was filed in 1718. A decree was made in 1720. The account was pending in the Master's Office until 1734, when it was referred to arbitration. The award was made in 1738, by which a sum of 5369*l.* 16*s.* 1*d.* was awarded to the Plaintiff, and the award was made a decree of the Court, which was affirmed upon appeal to Parliament in 1739.

In 1741, the Plaintiff to enforce the payment of the sum awarded and decreed, filed a new bill in the nature of a bill of amendment and revivor, against the representative of the Defendant in the former suit, charging that a certain mortgage held by him, was part of the assets, and praying that it might be applied in payment of the demand. The Defendant to the last suit, by his answer, admitted the mortgage. In 1742 the Plaintiff filed an amended bill. In 1747 he filed another amended bill, praying in default of personal estate a foreclosure of the mortgage, and that the principal and interest might be applied in satisfaction of his demand; stating among other things, that he had obtained a sequestration against the lands of G. B., the Defendant in the first suit, who had died before it could be executed; having by his will charged his lands with the payment of his debts. The object of this bill was to obtain payment of the sum awarded from the assets of G. B.; part of which assets, as the bill charged, consisted of a mortgage upon an estate, called Tyaquin; and that G. B. and his representative, had been in possession under the mortgage, and had received out of the rents and profits sufficient to satisfy the Plaintiff's demand.

In the years 1748, 1751, and 1754, upon the death of parties, bills of revivor and amended bills were filed. From this time no proceedings were taken until the year 1771, when a bill was filed by the representative of the original Plaintiff, against the representative of the original Defendant, stating impediments to the prosecution of the suit, and praying an account of the rents received from the lands mortgaged. In 1772 the Defendant filed an answer, refusing the discovery, and in 1773, upon exceptions, he filed a further answer, (still refusing the discovery,) which was reported insufficient.

From this time no further proceedings were taken in the cause, until the year 1785, when the representative of the Plaintiff in the last suit, and of the original Plaintiff, filed a bill of revivor and amended bill against the representative of the De-

defendant in the last suit, and against J. B., the heir of the alleged mortgagee, stating impediments to the prosecution of the suit, from the litigation in which his testatrix had been involved; and that a deed had been made by collusion, between the representative of the mortgagee, and J. B. the heir of the mortgagor, by which the former conveyed the lands to the latter, in consideration of an annuity; charging that the deed was a fraud upon the Plaintiff, and a *devastavit* of the assets, and praying an account of the real and personal estate of the first representative of the original mortgagee, who had charged his debts on his real estate, and devised it, and bequeathed his personalty to the Defendants his representatives.

In 1787, the Defendants, the representatives, by their answer, admitted that the deed as charged by the will was fraudulent, and contended that the Plaintiffs should first have recourse against the lands mortgaged. From 1787 to 1795, no step was taken in the cause. Between the years 1795 and 1804, nine bills of revivor and amended bills were filed. By a decree in 1808, accounts were directed to be taken of the personal and real assets, of the original Defendant and his first representative. In 1810, the Master reported that 28,657*l.* was due to the Plaintiffs; that the assets of the original Defendant consisted partly of a mortgage of the lands of T. which came into the hands of his representative, who had received of the rents and profits sufficient to answer the demand.

Upon exceptions to this report, and by a decree upon further directions, the Master was ordered to enquire under what title the representative of the original Defendant entered into the lands of T. Upon which reference, the Master reported that he entered as mortgagee. Exceptions being taken to this report, upon the ground, (among others) that notwithstanding the existence of apparent securities, and various accounts between the parties on the foot of an apparent mortgage, there was evidence before the Master, that the deeds were in reality only deeds of trust, to secure the estate against the claims of adverse creditors; and farther that there were existing judgments, being charges upon the lands prior to the Plaintiff's claim, and that the representative of the original Defendant entered upon the lands not by the virtue of the mortgage, but under the limitations of a marriage settlement; by a farther decree upon further directions, the exceptions on these points were allowed, and the account was directed to be taken, excluding the alleged mortgage, and the bill as against J. B. was dismissed.

Held on appeal that the decree was right.—*Kelly v. Bateman*,
p. 327

Whether delays such as appear to have occurred, and under

such circumstances as in the case reported, ought to operate as a bar to a demand in a Court of Equity?—*Quære*. J. D. *ibid*. Whether under the circumstances stated in the case, J. B. the heir of the supposed mortgagor, and re-lessee of the lands in question, was a necessary party to the appeal?—*Quære*. *Kelly v. Bateman* - - - - - p. 327

TITHES.

1. A., the owner of the tithes of a district in a parish, and B., his lessee, in July, 1824, filed a bill in Chancery against C., the occupier of lands within the district, praying an account for six years back of the tithes of clover, vetches, meadow, and rye grass, and other grasses, cut green, and partly left in the swathe, and partly cocked. C. by his answer, admitted the title of A. and B. to the tithes of the district, and his own occupation, and the taking of the tithes; but contended that the clover, &c. were small tithes, and belonged to and were claimed by the vicar, and that he paid to the vicar a composition for all the small tithes, and that the clover, &c. had been used as green meat for his husbandry horses; and upon these grounds he denied the title of the Plaintiffs to the tithes in question.

It appeared in evidence, that in the year 1822, C. had written a letter to B., stating, that on the day of writing the letter, he should cut vetches, and set out the tithes, and that he had no objection to compound; and in the year 1824, a letter having been written by the solicitor of A., threatening to file a bill for the tithes in question; C. by his answer to that letter, said that he had never refused to pay the lessee the tithes of green clover, vetches, and grass.

Upon these admissions, notwithstanding the objections raised by the answer, held, (reversing the decree of the Court below,) that the Plaintiffs were entitled to a decree for an account.

Whether the natural or artificial grasses, cut green, and lying in the swathe, or set up in cocks, are great or small tithes, and whether if given to husbandry horses, there being other food grown on the farm, sufficient for these horses, they are exempt from tithes? *Quære*.—*Lewis v. Allnutt* - p. 83

2. Upon a bill for tithes by a vicar, against the occupiers of an estate, which had belonged to the Knights Hospitallers of St. John of Jerusalem, and after the dissolution of the monasteries, being vested in King Henry the Eighth, had been granted by him to the Archbishop of York and his successors, under whom the Defendants occupied; the Defendants pleaded that the lands were held by the Hospital exempt from tithes; that they were so held and granted by the King; and they proved that no tithes had within memory

been paid for the lands. On the part of the vicar was produced an *insperimus* of an inquisition made under the authority of the Archbishop of York, in 1314; by which it was found, after specifying certain tithes, "that the vicar ought to receive *all other tithes* to the said church belonging, except corn and hay, which the master and bretheren of the Hospital of St. John of Jerusalem received as rectors; but that all the vicars had, ever since the time of the ordination of the vicarage, received all the tithes, and peaceably, and did so at that time, but they were bound to give their tithe of corn and hay."

Held upon the evidence of this document, that the vicar was entitled to the tithes claimed by his bill.—*Elsley v. Don-
nison* - - - - - p. 94

WARD. See GUARDIAN.

INDEX TO APPENDIX.

INSURANCE.

A. and Co. carrying on business in England as an Insurance Company, had an office and an agent in Scotland, with whom C. D. &c. for themselves and others as joint owners of a vessel, made an insurance, receiving from the agent a memorandum in general terms, importing, without exception of any sea risks, that the vessel was insured, and that a policy would be prepared and sent to be delivered to the assured or their order, on the third Monday in the ensuing month, or on any subsequent day. Notice of the effecting of the insurance was transmitted by the Scotch agent to the principals in London, who two months after the date of the memorandum, transmitted to the agent a policy of insurance, containing a clause by which the operation of the policy was to be suspended while the vessel should be at sea. This policy was not demanded by, nor delivered, nor shewn to the assured, who at the end of the year renewed their policy by the medium of the agent in Scotland, but by a memorandum of renewal signed by the agent in England, and referring to a specific policy, which although it was lying at the agent's office, was not then demanded by, nor delivered, nor shewn to them. Soon after this renewal of the policy, the ship was lost at sea by fire; under these circumstances, a judgment of the Court of Session, reversing a sentence of the Judge Admiral, was affirmed on appeal, but on distinct grounds, the House of Lords being of opinion that the memorandum was the contract between the parties, and therefore properly admitted in evidence upon the trial of an issue directed before the Jury Court, that the Stat. 6 Geo. I. c. 18., so far as related to Insurance Companies, did not extend to Scotland; that a contract made under the circumstances above stated was a Scotch contract, and that the principals and their agents were properly included in the same action.—*Pattison v. Mills* p. 520

MARRIAGE.

In May 1816, a marriage ceremony between M. and G. (according to the evidence of one witness who spoke positively to the performance of the ceremony, and the identity of the parties, confirmed by another witness, who spoke with less

firmness as to the identity,) was performed by a minister of the church of Scotland, upon the production of an instrument, purporting and proved to be a certificate of a proclamation of banns, which proclamation, from the date of the certificate, as compared with a registrate of the marriage and the evidence of the witnesses, could not possibly have been made. But it was proved to be the usual certificate, and that according to the practice in Scotland at the time, banns were in fact scarcely ever proclaimed, when such certificates were given. The minister who performed the ceremony had afterwards been banished for forgery and collusion in effecting a marriage, and became incompetent to give evidence; but a book kept by him, in which the marriage in question appeared to be regularly entered, was produced, and proved by the wife and daughter of the minister who also performed the ceremony.

M., who had afterwards married another husband, upon a suit to establish the first marriage, in her defence admitted that one evening in May 1816, by means of threats, and particularly of personal injury to a rival suitor, who afterwards became the second husband, she was induced to go and went with G. to the house of the minister before mentioned, but from the agitation of her mind, that she was incapable of paying attention to what then passed, and was convinced that she did not consent to the marriage. She also admitted that after the ceremony she returned with G. to her father's house, but denied the consummation.

It was in evidence that M. was in the habit of calling upon G. at his printing office, late in the evening and alone; and that after the ceremony of marriage, in speaking of it she said "it was not binding, what would two or three words of an "outlawed man do?" It was also in evidence that on two occasions, in the presence of her father, she was addressed, and her health drank by the name of Mrs. G., which salutation was in one instance returned, and in another received without observation by her or her father. It was also in evidence, that upon two occasions J., the second husband, after his marriage came to the house of M. when G. was there, and went secretly to an upper room, where he remained alone.

The marriage with G. as alleged, took place in May 1816. In June 1816, a marriage was regularly solemnized between M. and J. It was proved that G. before his alleged marriage with M. had admitted that J. was a more favoured suitor; that upon the marriage between M. and J. he had accepted a present of a pair of gloves; that he had been frequently present in social parties with J. and M., to whom

he drank by the name of Mrs. J.; that he slept in the same room where M. and J. were in bed together as man and wife, and in all his intercourse with them, which was very frequent, recognized them as such.

Two years after the marriage of M. and J., and their cohabitation, G. raised an action in the Commissaries Court against M. of declarator of marriage and adherence. There was issue of the marriage between M. and J. but neither the children nor J. were made parties.

Held, (reversing the judgment below,) that if a celebration of the ceremony of marriage took place between M. and G., it was to be presumed, under the circumstances before stated, that there was no real consent to marry.—*McNeill v. McGregor*.

Whether it is necessary that the second husband and the children should be parties to the suit. *Quære*.

Semb. That according to the practice of the Ecclesiastical Court, it is only necessary to make the principal a party, but that the other parties interested may intervene if they think fit, at any stage of the suit.

Supposing that the evidence had been deemed sufficient to warrant a declarator of marriage between M. and G., whether a sentence of adherence ought also to have been pronounced. *Quære*.

Upon a summons which alleges an irregular marriage, followed by consummation, and a regular marriage celebrated with a view to complete the irregular marriage, whether proof of the latter marriage, no proof being given of the former, would be a sufficient proof of marriage. *Quære*.

Whether after judgment upon such a summons, and proof negating the alleged regular marriage, a new action could be brought to establish the irregular marriage. *Quære*.

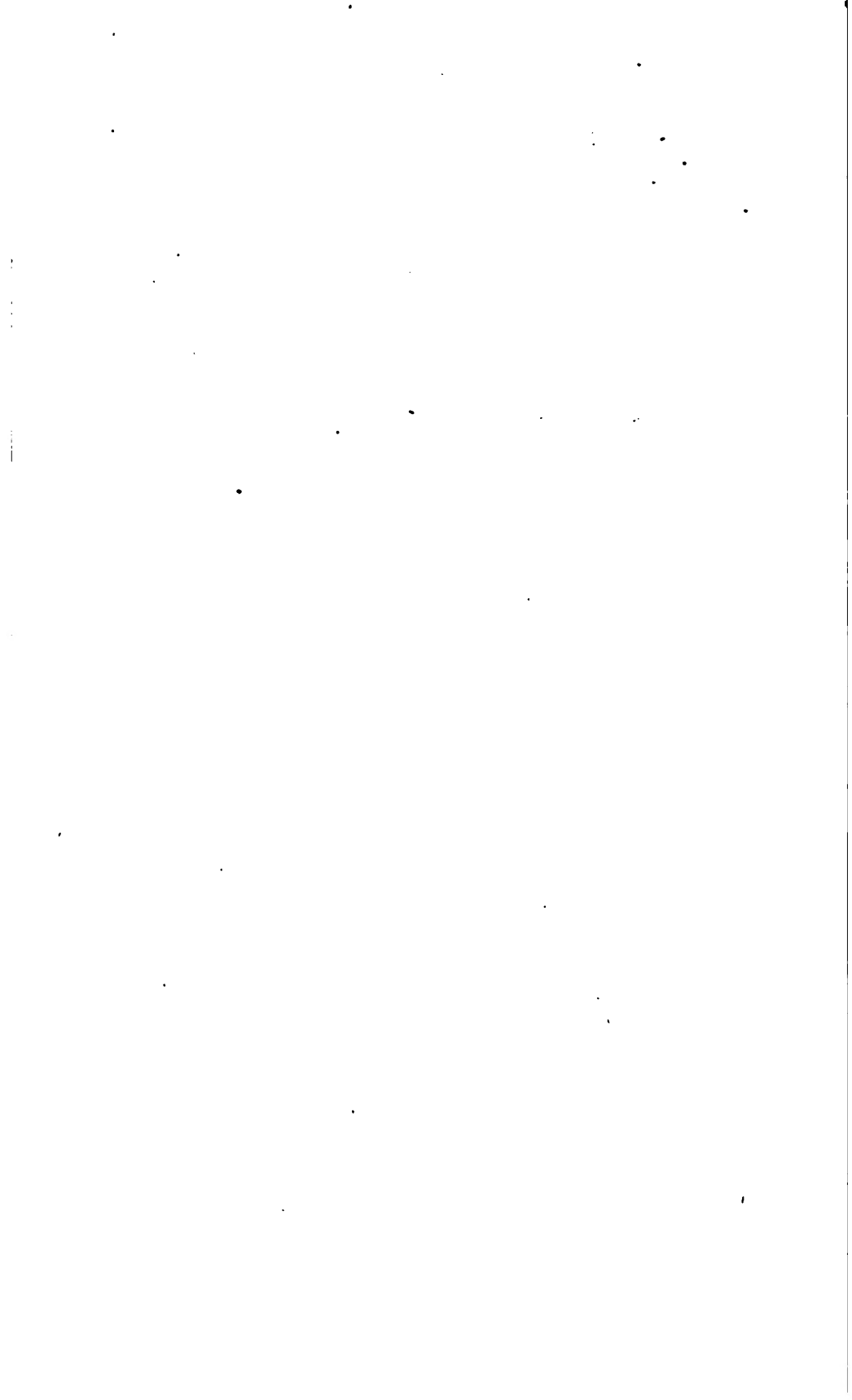
Whether according to the law of Scotland, entries made in a book kept by a minister of the church of Scotland, in the manner above described, are admissible in evidence to prove a marriage; and how marriages are to be proved, supposing the minister and witnesses are dead, or incompetent. *Quære*.

Whether the admission of a woman who may be claimed as a wife by two persons under such alleged ceremonies of marriage, and circumstances as above stated, is admissible in evidence as a proof of the first marriage. *Quære*.

Whether a marriage celebrated by a minister of the church of Scotland, upon such certificate as above mentioned, without actual publication of banns, is to be deemed, according to the practice, a regular marriage in Scotland. *Quære*.

Assuming it to be an irregular marriage, previous and subsequent conduct of the parties, is admissible evidence upon the question of consent. *Macneill v. McGregor* . 393







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